

**IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI**  
**BEFORE SHRI SHAMIMYAHYA, AM AND SHRI AMARJIT SINGH, JM**

**I.T.A. Nos. 3859/M/2017 & 3858/M/2017**

**Assessment Years: 2007-08 & 2008-09)**

Sejal Export (India) DC-7221, Bharat Diamond Bourse, G Block BKC Bandra Mumbai. Pin: 400051	Vs.	DCIT CEN CIR 1(2) R. No. 906, 9 <sup>th</sup> Floor, Old CGO Bldg Annexe M.K. RD. Mumbai. Pin: 400020
स्थायीलेखासं. / जीआइआरसं. / PAN/GIR No. : AAASF7201B		
<b>(Appellant)</b>	..	<b>(Respondent)</b>
Assessee by:		None
Department by:		Shri Ram Tiwari

**Date of Hearing:** 07.09.2017  
**Date of Pronouncement:** 27.09.2017

**ORDER**

**PER AMARJIT SINGH, JM:**

The assessee has filed the above mentioned appeals against the order dated 31.03.2017 passed by the Commissioner of Income Tax (Appeals)-47, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the assessment years 2007-08 & 2008-09. Since in these appeals common question of law and facts are involved, therefore, these appeals are being taken up together for adjudication.

**ITA NO.3859/M/2017:-**

2. The assessee has raised the following grounds:-

*“1. The ground or grounds 01 appeal are without prejudice to one another*

*1 On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in upholding the action of the AC) in re -opening of the assessment u/s147 of the Income 'tax Act, 1951 as the prescribed conditions therein are not satisfied.*

*2.aJ (In the facts and in the circumstances of the case and in law, the Id. CIT(A), having allowed certain relief, erred in conflicting the addition to the Want, of Rs2697,632/- made by the AC) to the income of the Appellant on account of possible profit element to the extent of 3% embedded in purchases made from alleged non-genuine panics on the basis of information received from DGIT Mumbai.*

*of The Id- C[T(A) failed to appreciate that:-*

*-  
all the purchases are genuine beyond doubt and supported by sufficient materials;*

*every purchase is backed by corresponding sale,  
the gross profit ratio shown by the Appellant is quite reasonable;  
the payment of purchases are made by account payee cheques only  
and*

*- nothing has been brought on record by the Id. AC) that money has exchanged the hands in lieu of payment made for these purchases by account payee cheque,*

*2.a) the Id. AD did not provide copy at materials and statements relied upon by him one allowed any opportunity to the Appellant to cross examine those parties who have been believed to have provided alleged entries of such purchases,*

*c) in reaching to the conclusion and confirming the addition partly, the Ld. CIT(A) omitted to consider relevant factors, considerations, principles and evidences white he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors as well as making certain assumptions contrary to the facts of the case.*

*Without prejudice, the addition made to the income of the appellant on account of so called possible profit element embedded in such purchases is quite excessive and unreasonable.*

*3. The ld. CIT(A) erred in holding that levy of interest u/s 234B, 234C and 234D of the I.T. Act, 1961 is mandatory. The appellant denies its liability for such interest. The Ld. CIT(A) erred in holding that the ground raised disputing initiation of penalty*

*proceedings u/s 271(1)(c) is premature. The appellant denies its liability for such penalty.  
The appellant craves leave to add, alter, amend or delete any or all of the above grounds of appeal.”*

3. The brief facts of the case are that the search and seizure action u/s 132 of the Income Tax Act, 1961,(hereinafter, “the Act”) was conducted in the case of assessee firm, its group concerns, partners and related persons on 12.01.2010. The business premises of the assessee was also covered in the above mentioned search action. During the course of search proceedings, Shri Parin S Shah, partner of the assessee firm disclosed u/s 132(4) of the Act about the unaccounted loans to the tune of Rs.1,00,000/- advanced to its employees during the year under consideration. The assessee filed the return of income u/s 153A of the Act on 03.06.2010 declaring total income to the tune of Rs.1,71,39,280/- including the unaccounted of loan of Rs.1,00,000/- admitted in the statement u/s 132(4) of the Act during the search proceedings. The assessment was finalized u/s 153A r.w.s. 143(3) dated 28.02.2011. The addition to the tune of Rs.10,000/- was made u/s 14A r.w. Rule 8D of the Act. Total income was assessed to the tune of Rs.1,71,49,280/-. DGIT (Inv), Mumbai vide its letter dated 13.03.2014 disclosed that the assessee has availed the accommodation/fictitious bills from the 13 parties to the tune of Rs.16,74,69,611/-. The case was reopened u/s 143 of the Act. After completing the procedure in accordance with law, assessing Officer assessed the profit on the bogus purchase to the tune of

Rs.16,74,69,611- @ 7.33% and accordingly the income to the tune of Rs.1,22,75,522/- was added to the income of the assessee and the total income was assessed to the tune of Rs.2,94,24,800/-. Feeling aggrieved, the assessee filed an appeals before the Commissioner of Income Tax Appeal who arrived at the conclusion that the profit element involved in the said bogus purchase is @ 2% which comes to the 33,49,392/- but the assessee was not satisfied therefore the assessee has filed the present appeal before us.

**ISSUE NO.1:-**

4. We have heard the argument advanced by the Ld. representative of the parties and perused the record. Under this issue, the assessee has raised the reopening of assessment u/s 147 of the I.T. Act, 1961. The case of the assessee was reopened on the ground of the information received from the DGIT(Inv), Mumbai vide letter dated 13.03.2014. It was mentioned that the assessee availed the accommodation/fictitious bills from the 13 parties to the tune of Rs.16,74,69,611/-. Thereafter the legal notice as required under law was given and the assessment was completed. The assessee did not appear despite service of notice, therefore, the assessment was completed Exparte. The factual position in connection with reopening the case is not in dispute. The case of the assessee was reopened upon the information received from the DGIT(Inv), Mumbai by virtue of letter dated 13.03.2014. It was explained that the assessee has availed

the accommodation/fictitious bills to the tune of Rs.16,74,69,611/-. It is necessary to advert the finding of the CIT(A) in this regard.:-

“I have considered the submissions of the appellant and perused the materials available on record including copies of the judicial decisions relied upon by the appellant. The issue for adjudication is whether the AO was justified in reopening the assessment u/s 147 of the Act beyond four years of the end of the relevant A.Y. and whether, while doing so he had complied with the terms of the first proviso to section 147 of the Act. It is a matter of record that the assessment of the appellant was reopened on the basis of the information received from the DGIT(Inv), Mumbai vide letter dated 13.03. 2014 that the appellant had obtained fictitious purchase bills or accommodation entries to the tune of Rs.16,74,69,611/- purchase bills or accommodation entries to the tune of Rs.16,74,69,611/- from aforesaid 13 parties and thereby suppressed its true profit for the relevant period. This information is found to have been unearthed in the course of search and seizure action carried out by the Department in the case of Shri Bhanwarlal Jain Group. This shows that the reopening of assessment was based not on subjective opinion or suspicion of the AO but on concrete and credible information received from the Investigation Wing. It is well settled that the sufficiency or correctness of the material is not a thing to be considered at this stage. It has only to be seen whether there was prima facie some material on the basis of which the Department could reopen the case (Raymond Woollen Mills Ltd. Vs. ITO 236 ITR 34 (SC)). Therefore, having received the said information from the Investigation Wing of the Department, no independent entry or verification was required to be undertaken by the AO before arrival at the prima facie conclusion that income chargeable to tax had escaped assessment in the hands of the appellant.

4.3.21 It appears that in the absence of this information, the issue of verification of genuineness of purchases made from the said 13 parties escaped the attention of the AO while making the earlier assessments first u/s.143(3) and later u/s.143(3) r.w.s.153A of the Act on 07.12.2009 and 28.02.2011 respectively. There is nothing to indicate that any objection was raised or any information was sought by the AO in regard to the purchases made from said 13 parties during the course of assessment. In other words, the issue was not under

consideration at all in the course or said assessments. When the matter was not examined by the AG in such assessments, the appellant cannot say that reopening is an attempt to review or reinvestigate the same or that it amounts to change of opinion. In this connection reliance is placed on judicial precedents in the cases of EMA India Ltd v ACIT 226 CTR (All) 559 and Consolidated Photo & finvest Ltd. V. AT 281 ITR 394 (Del.) wherein it has been held that the principle that a mere change of opinion cannot be a basis for reopening completed assessment would be applicable only to situations where the Assessing Officer has applied his mind and taken a conscious decision on particular matter in issue and not where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment. Following the same legal principle it cannot be said even in the instant case that there was any application of mind on part of the AG on this issue at the time of previous assessments and, therefore, the reopening of said assessment in these circumstances cannot be said to be based on change of opinion.

4.3.3 Finally, it is found that the AC. had proceeded to reopen the assessment because there was a failure on part of the appellant to disclose fully and truly facts necessary for its assessment. In this connection, it would be pertinent to refer to the judgment of Hon'ble(Supreme Court in the case of Phoolchand Oajran p/al 203 ITR 456 (SC) wherein it has been held that where on the basis of subsequent information, the transaction itself is found to be a bogus transaction, mere disclosure of that transaction at the time of original assessment proceedings cannot be said to be disclosure of 'true' and 'full' facts of the case and the ZIG would have jurisdiction to reopen the concluded assessment in that case. Since In the instant case, the purchases (rain the above 13 parties were not genuine purchases but in the nature of accommodation entries it is dear that the disclosure or aforesaid purchases as genuine in the books of account/ return of income cow, by no means be treated as full and true disclosure of facts necessary for the assessment of the appellant, As regards the appellant's objections to the reopening of its assessment, it is found that the AD had disposed of the same vide a speaking order passed an 6.10.2014. the reasons recorded by the AG are found to be having a live link with the formation of his belief. The belief entertained by the AG was that of on honest and reasonable person based upon reasonable grounds rather than on gossip, rumour or suspicion, thus there is no hesitation in holding

that the requirements of the first proviso to section 147 were satisfied in the present case. In view of the above discussion, I do not find any error or infirmity in the action of the AD in reopening the assessment of the appellant for the A.Y. under consideration based on the above information received from the investigation Wing and proceeding to reassess the income escaping assessment on this count. Ground No.1 taken up by the appellant is thus found to be devoid of merit and is accordingly dismissed.”

5. On appraisal of the above mentioned order, we noticed that there are no distinguishable facts on record. The case of the assessee was reopened u/s 147 of the Act after finding the information from DGIT(Inv), Mumbai dated 13.03.2014 in which it was conveyed that the assessee has availed the accommodation/fictitious bills from 13 parties total to the tune of Rs.16,74,69,611/-. Prima facie there is reason to believe that the income chargeable to tax has escaped assessment. The CIT(A) relied upon the case law title as **Raymond Woollen Mills Ltd. V. ITO 236 ITR 34 (SC)**. Moreover, this issue was not under consideration at the time of assessment therefore, there is no question of change of opinion. The present case is in connection with the availing of accommodation/fictitious bills entries by the assessee which was not on record at the time of the assessment of the assessee. These facts are totally new facts which came into notice before the AO through the letter dated 13.03.2014 received from the DGIT(Inv), Mumbai. Accordingly, we are of the view that the CIT(A) has rightly upheld the reopening of the proceedings u/s 147 of the I.T. Act.

Accordingly, we affirm the finding of the CIT(A) on this issue. And this issue is decided in favour of the revenue.

**ISSUE NO.2:-**

6. Under this issue the assessee has challenged the addition of the profit element to the extent of 0.25% on the bogus purchase of 13 parties to the tune of Rs.16,74,69,611/-. The contention of the assessee is that the addition should not be more than 1% specifically in view of the nature of the business of diamond of the assessee. Before going further it is necessary to advert the finding of the CIT(A) on record.:-

“I have considered the submissions of the appellant and perused the materials available on record including copies of judicial decisions relied upon the appellant. The point for determination is whether the AO is justified in making addition of Rs.1,22,75,522/- on account of element of extra profit of 7.33% embedded in the purchases made from the aforesaid 13 concerns. At the outset, it is proposed to take note of couple of Judicial al precedents having bearing on the Issue under adjudication. It is now well-settled that the onus is upon the assessee to prove the genuineness of the purchases (178 CTR (Raj) 420 and 186 CTR (HP) 718). In the case of CIT v. Precision Finance Pvt. Uil. 208 ITR 465 (Cal.), it has been held that payment made by account payee cheque is not sacrosanct and it would not make an otherwise non genuine transaction genuine. This view had also found favour with the Hon’ble Apex Court in the case of M/s. Kachwaia Gems, as brought out in the impugned order. It is now proposed to examine whether the appellant has been able to discharge the onus of proving that the purchases amounting to Ps. 16,7469,611f-made by it from the aforesaid 13 concerns are genuine. It is noticed from the record that the AC treated the aforesaid purchases from 13 parties as bogus or non-genuine not merely on the basis of information received from the Investigation Wing but also because

the appellant failed to furnish the purchase orders delivery challans/ angadia receipts etc, in respect of the said purchases of cut and polished diamonds. The absence of these supporting evidences lent credence to the AO's finding that the purchases shown to have been made by the appellant from aforesaid 13 concerns were nothing but accommodation entries without any actual movement or delivery of goods.

6.3.2 A perusal of the relevant invoices reveals that out of aforesaid 13 concerns of Bhanwarlal Jain Group, many concerns were having common addresses, as brought out in the table below:

Sr. No.	Name	Address
1	Ankita Exports, Milan & Co.	3-M Ambika Darshan, Moti Kadia Sheri, Saiyadpura, Surat-395003
	Parvati Exports	
2		204, Vaibhav Chamber Rughnathpura Main Road, Surat- 395003
3	Mukti Exports	407, Devratna Apartment, Rampura main Road, Surat-395003
	Mohit Enterprises	
	Pankaj Exports	
	Pushpak Gems	
	Rajan Diamonds	

It is also noticed that invoices of almost all 13 concerns were prepared on the computer in the same format having the same font type as well as (font) size. it is pertinent to mention that while t% VAT is leviabale on such transactions in Mumbai/ Maharashtra, the diamond sector in Surat/Gujarat is exempted from payment of VAT. Thus, there is a saving of VAT involved in procuring (accommodation) purchase bills of cut and polished diamonds from parties like the aforesaid concerns based in Surat. I am unable to accept the appellant's plea that there is nothing it support of cash purchases of goods from the grey market, because these transactions take place in secret and no direct evidence in this regard is generally available. it is well-established that such matters have to but considered in the light of surrounding circumstances normal course of human conduct and preponderance of probabilities. However, it is pertinent to mention that the fact that the appellant was one of the beneficiaries of the accommodation entries obtained from entry providers operating in

Mumbai came to Fight only during the course of search and seizure actions carried out in the case of Shri Bhanwarlal Jain Group. The purchases of cut and polished diamonds shown to have been made from aforesaid 13 parties cannot be regarded as genuine merely because the appellant was not related to the suppliers or because the GP rate shown by the appellant was reasonable or satisfactory and had been accepted in the past. However, since the appellant had furnished copies of account confirmations, purchase invoices, etc. and quantitative details of the principal items of raw materials and finished goods in carat were available in the tax audit report, Tam in agreement with the AO's finding that the cut and polished diamonds were purchased by the appellant from the grey and to give this the colour of genuine purchases, bogus purchase were obtained from aforesaid 13 concerns. It deserves to be noted that the AO had not rejected the books of account of the appellant because he had no material to doubt the genuineness of sales/ exports made by the appellant.

6.3.3 It is now well established that Ln a case where the purchases have been actually made but not from the parties from whom these are claimed to have been made and instead may have been purchased from grey market without proper or documentation, only the profit element embedded therein needs to be brought to tax The estimation of rate of profit must necessarily vary with the nature of business and no uniform yardstick can be adopted. It Is well-known that if purchases are made from open market without Insisting on the genuine bills, the suppliers may be willing to sell those products at a much lower rate as compared to the rate which they may charge in case the dealer has to give a genuine sale invoice in respect of that sale and supply the goods. It is a matter of common knowledge that there is bound to be a substantial difference between the purchase price of unaccounted material and rate of purchase of accounted for goods due to various factors such as saving on account of sales-tax and other taxes and duties leviable in respect of manufacture or sale of goods in question and substantial saving in the income-tax to suppliers in respect of income from sale of unaccounted goods etc In these circumstances, the diamonds in the grey market are always cheaper than the diamonds sourced from the genuine dealer, because there is an element of discount in case of instant cash purchase. Therefore: the AO has correctly concluded that an addition is required to be made

in case of the appellant so as to bring to tax the profit element embedded in such purchases.

6.3.4 Coming now to the estimation of profit margin @7.33% by the PO in the present case, I find merit in the appellants plea that the extra profit of 7.33% estimated by the PO is excessive and unreasonable. This is so because the AO has not given any basis or justification for adopting settlement at 7.33%. In this connection it is pertinent to note of cut and polished diamonds from open market is made mainly to save 1% VAT levied thereon and in addition, the buyer gets the benefit of lower rate/cash discount. In these circumstances, the addition of extra profit @ 7.3% of purchases from aforesaid concerns cannot at all be said to be justified. In view of the this position, it is considered fair and reasonable to estimate the profit margin embedded in such purchases at 2% of the purchase value recorded in the books of account. Since, the appellant has shown purchases to the tune of Rs.16,74,69,611/-, the profit element involved therein @ 2% of the purchase value will come to Rs.33,49,392/- as against Rs.1,22,75,522/- worked out by the AO. Thus, the appellant gets relief of Rs.89,26,130/- (1,22,75,522/- Rs.33,49,392/- on this count. Ground no. 3 of the present appeal is accordingly allowed to the extent indicated above.”

7. Assessing Officer estimated the gross profit upon the bogus purchase/accommodation entries @ 7.3%. The CIT(A) assessed the profit ratio on gross profit @ of 2%. It is not in dispute that the profit element was assessed on the bogus/accommodation purchase by the assessee on the amount to the tune of Rs.16,74,69,611/-. The CIT(A) was of the view that the purchase of cut and polished diamond from the open market was made mainly to save 1% vet levied thereon and in addition the buyer get the benefit of lower rate/ cash discount. In the said circumstances, the CIT(A) was of the view that the addition of extra profit @ 7.3% of purchases was not held to be justified and

reduced the profit embedded in the transaction @ of 2% of purchase value record in the books of accounts. No distinguishable material has been placed on record even after service of the notice to assessee to the contradict the finding of the CIT(A) on record. Nothing came into notice that the assessee produced some material earlier which was not considered by the CIT(A). Taking into account all the facts and circumstances we are of the view that the CIT(A) has rightly estimated the profit @ 2% on gross profit of the purchase value which comes to the tune of Rs.37,49,392/-. Accordingly, we find that the CIT(A) has passed the order judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly this issue is decided in favour of the Revenue.

**ISSUE NO.3:-**

8. Issue no. 3 is consequential in nature which nowhere required to be adjudication. The provision of Section 234B and 234C of the I.T. Act, 1961 would be applicable as per law.

**ISSUE NO.4:-**

9. Issue no. 4 is in connection with initiating of the penalty in the assessment order but penalty is not under challenge therefore, we find this issue as premature hence is hereby ordered to be dismissed.

10. In result the appeal filed by the assessee is hereby ordered to be Dismissed.

**ITA NO.3858/M/2017:-**

**11. The assessee has raised the following grounds:-**

*“The ground or grounds 01 appeal are without prejudice to one another*

*1 On the facts and in the circumstances of the case and in law, the Id. CITA) erred in upholding the action of the AC) in re -opening of the assessment u/s147 of the Income Tax Act, 1951 as the prescribed conditions therein are not satisfied.*

*2.a) (In the facts and in the circumstances of the case and in law, the Id. CIT(A), having allowed certain relief, erred in conflicting the addition to the Income, of Rs2697,632/- made by the AC) to the income of the Appellant on account of possible profit element to the extent of 3% embedded in purchases made from alleged non-genuine panics on the basis of information received from DGIT Mumbai.*

*of The Id- CIT(A) failed to appreciate that:-*

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all the purchases are genuine beyond doubt and supported by sufficient materials;  
every purchase is backed by corresponding sale,  
the gross profit ratio shown by the Appellant is quite reasonable;  
the payment of purchases are made by account payee cheques only  
and*

*- nothing has been brought on record by the Id. AC) that money has exchanged the hands in lieu of payment made for these purchases by account payee cheque,*

*2.a) the Id. AD did not provide copy of materials and statements relied upon by him one allowed any opportunity to the Appellant to cross examine those parties who have been believed to have provided alleged entries of such purchases,*

*c) in reaching to the conclusion and confirming the addition partly, the Ld. CIT(A) omitted to consider relevant factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors as well as making certain assumptions contrary to the facts of the case.*

*Without prejudice, the addition made to the income of the appellant on account of so called possible profit element embedded in such purchases is quite excessive and unreasonable.*

3. The ld. CIT(A) erred in holding that levy of interest u/s 234B, 234C and 234D of the I.T. Act, 1961 is mandatory. The appellant denies its liability for such interest. The Ld. CIT(A) erred in holding that the ground raised disputing initiation of penalty proceedings u/s 271(1)(c) is premature. The appellant denies its liability for such penalty.

*The appellant craves leave to add, alter, amend or delete any or all of the above grounds of appeal.”*

12. The facts of the case are that quite similar to the facts of the case as mentioned in the appeal of the assessee bearing **ITA. No. 3859/M/2017** however, the figure is different. The issue raised in this appeal has been adjudicated while deciding these issues in ITA. No.3859/M/2017. Therefore, there is no need to decide the said issues separately, hence, the issues raised in this appeal are hereby decided in favour of the revenue against the assessee in view of the terms as mentioned in ITA. No. 3859/M.2017.

13. In the result, all the appeals filed by the **assessee are hereby Dismissed.**

Order pronounced in the open court on 27.09.2017

Sd/-

(SHAMIM YAHYA)

लेखासदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : .09. 2017

*v.p. singh*

Sd/-

(AMARJIT SINGH)

न्यायिकसदस्य/JUDICIAL MEMBER

**आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त (अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल /Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापितप्रति //True Copy//

**उप/सहायकपंजीकार (Dy./Asstt.Registrar)**

**आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai**