

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल, मुंबई ।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL "L", BENCH, MUMBAI**  
सर्वश्री राजेन्द्र, लेखा सदस्य, एवं , राम लाल नेगी न्यायिक सदस्य के समक्ष

**BEFORE SHRI RAJENDRA, AM AND SHRI RAM LAL NEGI, JM**  
आयकर अपील सं./ITA No. 3195/Mum/2017  
(निर्धारण वर्ष / Assessment Year: 2007-08)

M/s Jaimin Jewellery Exports, 52, Marble Arch, G Dashukh Marg, Peddar Road, Mumbai - 400026	Vs.	The ACIT-19(2), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AACFJ2140C</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./ITA No. 3194/Mum/2017  
(निर्धारण वर्ष / Assessment Year: 2009-10)

M/s Jaimin Jewellery Exports Pvt. Ltd., 52, Marble Arch, G Dashukh Marg, Peddar Road, Mumbai - 400026	Vs.	The ACIT-5(2)(1), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AABCJ9820F</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./ITA No. 3203/Mum/2017  
(निर्धारण वर्ष / Assessment Year: 2009-10)

The Dy. Commissioner of Income Tax, Circle 5(2)(1), Room No. 571, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s Jaimin Jewellery Exports Pvt. Ltd., C/o Mehta Family Trust, 52, Marble Arch, G Dashukh Marg, Peddar Road, Mumbai - 400026
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AABCJ9820F</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Hari S. Raheja( AR)  
राजस्व की ओर से / Revenue by : Shri Com. V. Rajguru (Sr.DR)

सुनवाई की तारीख / **Date of Hearing :** 28/02/2018  
घोषणा की तारीख/**Date of Pronouncement:** 28/02/2018

## **आदेश / O R D E R**

**PER RAM LAL NEGI, JM**

These are the appeal and cross appeals filed by the assessee and the revenue preferred against the orders dated 03.02.2017 and 19/01/2017 passed by the Ld. Commissioner of Income Tax (Appeals)-29, Mumbai, pertaining to the Assessment Years 2007-08 and 2009-10 respectively. Vide order dated 03.02.2017, the Ld. CIT (A) has dismissed the appeal filed by the assessee against assessment order pertaining to the assessment year 2007-08 passed u/s 143 (3) read with section 147 of the Income Tax Act, 1961 (for short 'the Act') and vide order dated 19/01/2017 the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) read with section 147 of the Act, pertaining to the assessment year 2009-10. Since, all the three appeals pertain to the same assessee, the same were clubbed, heard together and are being disposed of by this common order for the sake of convenience.

### **ITA No. 3195/Mum/2017 (Assessment Year 2007-08)**

2. The facts of the case, in brief are that the assessee firm engaged in the business of designing manufacturing, import and export of diamonds and diamonds studded gold jewellery, filed its return of income for the assessment year 2007-08 declaring the total income of Rs. 1,40,54,580/-. The assessment was re-opened an addition of Rs. 1,42,99,972/- was made on account of bogus purchases made by the assessee from Sun Diamonds and Mihir Diamonds on the ground that as per the information received from the Director General of

Income Tax (Inv.) (DGIT), during the year relevant to the assessment year under consideration, the assessee obtained accommodation bills from two bogus parties. During the assessment proceedings, the assessee submitted the copies of bills, proof of payment, bank statements, affidavit and confirmations of the parties and contended that the goods were genuinely purchased. However, rejecting the contention of the assessee, the AO made addition of the total amount of bogus purchases made by the assessee during the year relevant to the assessment year under consideration.

3. Aggrieved by the assessment order, the assessee challenged the same before the Ld. CIT (A). The Ld. CIT(A) after hearing the assessee dismissed the appeal of the assessee and confirmed the addition made by the AO. Against the said order, the assessee is in appeal before this Tribunal.

4. The assessee has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

1. *“In the facts and the circumstances of the case and in law, the learned A.O. erred in passing the order u/s 143 (3) r.w.s. 147 and therefore rendering the whole re-assessment bad in law, that too after a gap of four years and also on the basis of borrowed satisfaction, presumption and surmises and without furnishing the reasons recorded for reopening to the Appellant.*
2. *In the facts and the circumstances of the case and in law, the learned Assessing Officer erred in making and the learned Commissioner of Income Tax (A) erred in confirming addition amounting to Rs. 1,42,99,972/- being 100% of total purchases amounting to Rs. 1,42,99,972/- as alleged bogus purchases.*
3.
  - a. *Even though the payment for purchases is made from the books by A/C payee cheques and cannot be termed as bogus even though the same has been fully allowed by the jurisdictional Mumbai Tribunal in recent case of Rajeev M Kalathil 6727/M/12, Ganpatraj A Sanghavi [I.T.A. No. 2826/Mum/2013] and Ramesh Kumar & Co.*

*Appeal No. 2959/Mum/20104, Deepak Popatlal Gala [ITA No. 5920/M/13], Ramila P Shah [ITA No. 5246/M/13] Paresh Gandhi [ITA No. 5706/M/2013], Hiralal Chunilal Jain [ITA No. 4547/M/14], Tarla Shah [ITA No. 5259/Mum/2013], M/s Imperial Imp. & Exp [ITA No. 5427/M/2015], Shivshankar R. Sharma, [ITA No. 5149/Mum/2014 & 4260/Mum/2015], Govind Rathod [ITA No. 439/Mum/2016], Shri Mahesh K. Shah ITA No. 5194/Mum/2014, Shri Sanjay Dhokad [ITA No. 929/Mum/2015], Manohar and Anita Kanda [ITA No. 4693-97/Mum/2016] Bigwin Paper Distributors Pvt. Ltd. [ITA No. 5293-97/Mum/2016], Shri Sanjay Dhokad 2010-11 [ITA No. 5243/Mum/2013] and Hi Rock Construction Co. [ITA No. 960/Mum/2015].*

- b. Made the addition only on the basis of third party statements.*
  - c. Without appreciating the fact that no addition can be made if the suppliers are not traceable as per the judgment of the Bombay High court.*
  - d. Even though the payments were made by A/C Payee Cheques from the disclosed bank accounts.*
  - e. Without furnishing copies of the statements of M/s Sun and M/s Mihir Diamonds,*
  - f. Without affording opportunity of cross-examination of M/s Sun and M/s Mihir Diamonds.*
- 4. The Assessing Officer wrongly charged interest u/s 234 and initiated penalty u/s 271(1)(c).*
  - 5. In the facts and circumstances of the case and in law, the Commissioner of Income Tax (A) erred in dismissing the grounds of appeal on merits as above said.*

5. The Ld. counsel for the assessee assessee submitted that the Ld. CIT(A) has wrongly confirmed the action of AO in reopening the assessment contending that the order passed u/s 143 (3) read with section 147 of the Act is bad in law as the same has been passed after a gap of 4 years on the basis of borrowed satisfaction, presumption and surmises without furnishing the reasons recorded for re-opening to the appellant. The Ld. counsel further submitted that the Ld. CIT (A) has erred in confirming 100% addition of the alleged bogus transactions. The purchases cannot be termed as bogus on the

ground that payments were made through account payee's cheques. Moreover, the addition has been made on the basis of third party statement. As per the judgment of Hon'ble Bombay High Court rendered in CIT vs. Nikunj Eximp Enterprises Pvt. Ltd, 372 ITR 619 (Bom) no addition can be made on the ground that the suppliers are not traceable. The Ld. counsel further submitted that since the AO has not disputed the sale, there cannot be 100% addition of the amount of alleged bogus purchases. The Ld. CIT (A) in the assessee's own case for A.Y. 2009-10 restricted the addition to 3% of the alleged bogus purchases and the assessee has filed appeal against the findings of the Ld. CIT(A). Since the assessee has submitted copies of the bills, proof of payment, bank statements, affidavits, confirmations of the parties. The Ld. CIT (A) ought to have deleted the addition made by the AO. The Ld. counsel without prejudice submitted that the H bench of the ITAT Mumbai has restricted the addition to 2% of the bogus purchase in the case of *M/s Choron Diamond Pvt. Ltd.* (a group concern) in ITA No 4449/mum/2016, ITA No 6798/Mum/2016 and ITA No 6800/Mum/2016 for the assessment years 2007-08, 2008-09 and 2008-09 respectively, considering the presumptive rate recommended by the task group for diamond sector submitted to the department of commerce.

6. On the other hand, the Ld. Departmental Representative (DR) relying on the order passed by the Ld. CIT (A) submitted that since the assessee has failed to establish the genuineness of transaction by producing Daily stock register, stock of jewellery, delivery challan. The assessee has also failed to produce the suppliers for verification. As per the settled law, when expenditure is claimed to have been incurred, the burden will be on the assessee to prove the genuineness of purchase. Since, the evidence produced by the assessee are not sufficient to conclude that the transactions are genuine, the Ld. CIT(A) has rightly sustained the addition made by the AO.

We have heard the rival submissions and also perused the material on record in the light of the contentions of the parties. The assessee has challenged the jurisdiction of AO in initiating proceedings u/s 147 of the Act on the ground that the AO had no reason to believe that any income chargeable to tax had escaped assessment in order to reopen the assessment. But in our considered view, the information received from the DGIT (Inv.) to the effect that the assessee had obtained accommodation bills from bogus parties during the year relevant to the assessment year under consideration was sufficient to form the opinion that income of the assessee chargeable to tax has escaped assessment as envisaged in section 147 of the Act. The reason to believe can be on the basis of any information which comes to the notice of the AO. We therefore, do not find any infirmity in the action of the AO in re-opening the assessment. Hence, we uphold the findings of the Ld. CIT(A) so far as this ground in concerned and dismiss this ground of appeal of the assessee.

7. The second issue raised issue raised by the assessee pertains to 100% addition of the total amount of bogus purchases determined by the AO. The assessee has challenged the action of Ld.CIT (A) in confirming the addition *inter alia* on the ground that addition cannot be made on the basis of the third party statement, no addition can be made for the reason that the suppliers are not traceable, the AO has passed the order without affording opportunity of cross-examination of the witnesses whose statements were relied by the AO. We notice that the assessee was asked to produce the documents to establish the genuineness the transactions during the assessment proceedings, however, the assessee failed to produce the vital documents to prove the physical delivery of goods. In our considered view, on the basis of documents produced by the assessee it cannot be concluded that the purchases in question are genuine. So, on the basis of material on record, we are convinced that the

assessee has failed to establish the genuineness of purchases made during the relevant year from Sun and Mihir Diamonds amounting to Rs. 1,42,99,972/-.

8. So far as the confirmation of 100% addition by the Ld. CIT (A) is concerned, we do not agree with the Ld. CIT(A). Once the sale is accepted the AO cannot deny the purchases as there cannot be any sale without purchase. In the present case the AO has not disputed the sale recorded in the books of account. While upholding the decision of Mumbai Tribunal the Hon'ble Bombay High Court In *CIT Vs. Nikunj Eximp Enterprises Pvt. Ltd.* (supra) has held that merely because the suppliers had not appeared before the Assessing Officer or the CIT (A) one could not conclude that the purchases were not made by the respondent/assessee. Since, the AO has not rejected the sale made by the assessee during the relevant year, there is no justification of making 100% addition. The Hon'ble Gujrat High Court in *CIT vs. Simit P. Seth 356 ITR 451(Guj)* upheld the decision of the Tribunal and sustained the addition 12.5% of the total bogus purchases holding that only profit element embedded in such purchases can be added to income of the assessee. In the instant case the Ld. CIT (A) has sustained 100% addition made by the AO which is not justified in view of the nature of the business of the assessee. The assessee has declared the gross profit of 4.45% and net profit of Rs. 2.56%. Under these circumstances we restrict the addition to 2.50% of the total amount of bogus purchases determined by the AO keeping in view the nature of business of the assessee, the gross profit declared by the assessee and the Task Group of Diamond Sector submitted to the department of commerce. We therefore set aside the order passed by the Ld.CIT (A) and direct the AO to make addition of 2.50% of the total amount of bogus purchases made by the assessee. Accordingly, this ground of the assessee is partly allowed.

Vide ground No 3 the assessee has challenged the action of AO in charging interest u/s 234 of the Act and initiating penalty u/s 271(1)(c) of the Act. Since, charging of the interest is consequential, we do not adjudicate this issue. Similarly, initiation of the penalty being a separate proceeding, cannot be adjudicated along with the other grounds of the present appeal. Hence, both the grounds are dismissed.

Ground No 4 is general in nature, hence no separate adjudication is required.

**ITA No. 3194/Mum/2017 (Assessment Year 2009-10)**

The present appeal pertains to the assessment year 2009-10. The assessee filed its return of income for the relevant assessment year declaring the total loss of Rs. 89,58,190/-. The AO completed the assessment u/s 143 (3) of the Act determining the total income at Rs. 8,39,28,620/-, disallowing the loss on derivatives of Rs. 7,49,70,430/- . The assessment was rectified u/s 154 of the Act and the total income was revised and re-determined at 9,98,97,541/- Subsequently, on the basis of information received from DGIT (Inv.). The case was re-opened and order u/s 143 (3) read with section 147 read with section 154 of the Act was passed determining the total income at Rs. 58,55,16,160/- by inter alia making addition of Rs. 48,56,18,619/- on account of bogus purchases made by the assessee from 14 numbers of bogus parties mentioned in the assessment order .

2. Aggrieved by the assessment order, the assessee carried the matter to the Ld.CIT (A) in first appeal. The Ld. CIT (A) after hearing the assessee restricted the addition to 3% of the total amount of bogus purchases keeping in view the nature of business and the element of profit embedded in the transaction in question. The Ld. CIT(A) further confirmed the disallowance amounting to Rs. 7,49,70,430/-on account of loss on foreign currency fluctuation.

3. Against the said order, the assessee has preferred the present appeal raising the following effective ground of appeal against the impugned order passed by the Ld. CIT (A):-

1. *“In the facts and the circumstances of the case and in law, the learned A.O. erred in passing the order u/s 143 (3) r.w.s. 147 and therefore rendering the whole re-assessment bad in law, that too after a gap of four years and also on the basis of borrowed satisfaction, presumption and surmises and without furnishing the reasons recorded for reopening in the case of the firm which is no longer existing and without rebutting objections raised u/s 292BB.*
2. *In the facts and the circumstances of the case and in law, the learned Assessing Officer erred in making and the learned Commissioner of Income Tax (A) erred in confirming the disallowance amounting to Rs. 1,45,68,558/- being 3% of total purchases of Rs. 48,56,18,619/- by way of unexplained expenditure u/s 69C.*
  - a. *Even though the payment for purchases is made from the books by A/C payee cheques and cannot be termed as bogus even though the same has been fully allowed by the jurisdictional Mumbai Tribunal in recent case of Rajeev M Kalathil 6727/M/12, Ganpatraj A Sanghavi [I.T.A. No. 2826/Mum/2013] and Ramesh Kumar & Co. Appeal No. 2959/Mum/2014, Deepak Popatlal Gala [ITA No. 5920/M/13] and Ramila P Shah [ITA No. 5246/M/13] Paresh Gandhi [ITA No. 5706/M/2013], Hiralal Chunilal Jain [ITA No. 4547/M/14], Tarla Shah [ITA No. 5259/Mum/2013], M/s Imperial Imp. & Exp [ITA No. 5427/M/2015], Shivshankar R. Sharma, [ITA No. 5149/Mum/2014 & 4260/Mum/2015], Govind Rathod [ITA No. 439/Mum/2016], Shri Mahesh K. Shah ITA No. 5194/Mum/2014, Shri Sanjay Dhokad [ITA No. 929/Mum/2015], Manohar and Anita Kanda [ITA No. 4693-97/Mum/2016] Bigwin Paper Distributors Pvt. Ltd. [ITA No. 5293-97/Mum/2016], Shri Sanjay Dhokad 2010-11 [ITA No. 5243/Mum/2013] and Hi Rock Construction Co. [ITA No. 960/Mum/2015].*
  - b. *Made the addition only on the basis of third party statements.*

- c. *Without appreciating the fact that no addition can be made if the suppliers are not traceable as per the judgment of the Bombay High court.*
  - d. *Even though the payments were made by A/C Payee Cheques from the disclosed bank accounts.*
  - e. *Without furnishing copies of the statements of 14 parties mentioned therein.*
  - f. *Without affording opportunity of cross-examination of 14 parties mentioned therein.*
  - g. *By making the contentions u/s 68 and thereafter adding the same u/s 69C.*
  - h. *Without rejecting books of accounts.*
3. *In the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (A) erred in confirming the disallowance amounting to Rs. 7,49,70,430/- on account of loss on foreign currency fluctuation by disregarding the fact that the Appellant needs to enter into forward contract in order to Hedge risk as the amount involved is high significant. The learned Commissioner of Income Tax (A) also disregarded the fact that the similar disallowance were allowed in the case of Appellant by the Honorable High Court and Honorable ITAT.*
  4. *The Assessing Officer wrongly charged interest u/s 234 and initiated penalty u/s 271(1)(c).*
  5. *In the facts and circumstances of the case and in law, the Commissioner of Income Tax (A) erred in dismissing the grounds of appeal on merits as above said.*

4. The first ground of this appeal is identical to the first ground of assessee's appeal for the assessment year 2007-08 aforesaid. Since we have dismissed the identical ground of appeal in the assessee's own case for the assessment year 2007-08, consistent with our findings, we dismiss this ground of appeal of the assessee for the reasons recorded in our order for the assessment year 2007-08.

5. Vide ground No 2 the assessee has challenged the action of the Ld. CIT(A) in confirming the disallowance of 3% of the total purchases made by the

assessee from the bogus parties during the year relevant to the assessment year under consideration.

6. Before us, the Ld. Counsel for the assessee and the Ld. DR reiterated the arguments advanced in the assessee case for the assessment year 2007-08. The Ld. DR further submitted that the Department has filed cross appeal against the impugned order passed by the Ld.(CIT)A on this issue.

7. In the light of the rival submissions we have perused the material on record, Since, we have restricted the addition to 2.50% of the total amount of bogus purchases determined by the AO, consistent with our findings in the assessee is in appeal for the assessment year 2007-08 aforesaid, we sustain the addition of 2.50% of total amount of bogus purchases in question for the reasons recorded in our findings. Hence, we set aside the findings of the Ld. CIT(A) and dismiss this ground of appeal of the assessee.

8. Vide ground No 3 the assessee has challenged the action of the Ld. CIT(A) in confirming the disallowance amounting to Rs.7,49,70,430/-on account of loss on foreign currency fluctuation. The Ld. counsel for the assessee submitted that the Hon'ble High Court has decided this issue in favour of the assessee. The counsel submitted the copy of order dated 17.02.2017 passed by the Hon'ble Bombay High Court in Income Tax Appeal No 1440of 2014 vide which the Hon'ble Court has dismissed the appeal of the revenue holding that since the issue is covered by the decision of this court, the question as formulated does not give rise to any substantial question of law. Hence, we allow this ground of the appeal of the assessee and direct the AO to pass order giving effect to the said order

9. Ground No 4 of this appeal is identical to the ground No 3 of the assessee's appeal for the assessment year 2007-08. Since, charging of the interest is consequential, we do not adjudicate this issue. Similarly, initiation

of the penalty being a separate proceeding, the said ground cannot be adjudicated along with the other grounds of the present appeal. Hence, both the grounds are dismissed.

Ground No 5 is general in nature which does not require adjudication.

**ITA No. 3203/Mum/2017 (Assessment Year 2009-10)**

The revenue has filed this cross appeal against the order dated 19.01.2017 passed by the Ld. CIT (A) raising the following ground of appeal:

*“On the fact and circumstances of the case and in law, the ld. CIT (A) erred in considering the GP @ 3% on alleged bogus purchase*

2. Since we have dealt with this issue in assessee’s case ITA 3194/M/17 and after hearing the rival submissions we have restricted the addition to 2.50% of the total amount of bogus purchases made by the assessee during the year relevant to the assessment year under consideration, this ground of appeal of the revenue has become infructuous. Hence, we dismiss the sole ground of appeal of the assessee.

In the result, appeal filed by the assessee for the assessment year 2007-08 is partly allowed, appeal filed by the assessee for the assessment year 2009-10 is partly allowed and the cross appeals filed by the revenue for assessment year 2009-10 is dismissed.

Order pronounced in the open court on 28<sup>th</sup> February, 2018.

*Sd/-*  
(RAJENDRA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 28/02/2018

*Sd/-*  
(RAM LAL NEGI)

JUDICIAL MEMBER

*Alindra, PS*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
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**