

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "F" MUMBAI**

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4323/MUM/2016  
Assessment Year: 2008-09  
&  
ITA No. 4328/MUM/2016  
Assessment Year: 2009-10  
&  
ITA No. 4322/MUM/2016  
Assessment Year: 2010-11  
&  
ITA No. 4324/MUM/2016  
Assessment Year: 2011-12**

Vaibhav Deepak Shah  
5/7, V.P. Road,  
Dadarkar House, 1<sup>st</sup>  
floor, Flat No. 9-10,  
Mumbai-400004.

Vs.

Assistant Commissioner of  
Income Tax, Central Circle-13  
New CGO Building, Prathistha  
Bhavan. M.K. Road  
Mumbai-400020

**PAN No. BBGPS2674L**

**Appellant**

**Respondent**

**ITA No. 4407/MUM/2016  
Assessment Year: 2008-09  
&  
ITA No. 4408/MUM/2016  
Assessment Year: 2009-10  
&  
ITA No. 4409/MUM/2016  
Assessment Year: 2010-11  
&  
ITA No. 4410/MUM/2016  
Assessment Year: 2011-12**



i) The Ld. CIT(A) erred on facts and in law in upholding the addition made by the Assistant Commissioner of Income Tax, Central Circle - 13, Mumbai (AO) on account of alleged bogus purchases to the extent of Rs.4,70,82,615/- as against the addition of Rs.6,80,85,951/- by holding that the appellant had himself admitted of having made purchase of diamonds in cash to the tune of 30% and hence it would be appropriate to adopt the suppressed profit @ 30% of the disputed purchases.

ii) The Ld. CIT(A) while confirming the addition of Rs.4,70,82,615/- on account of alleged bogus purchases, erred on facts and in law in holding that a disallowance u/s. 40A (3) would get attracted to tune of 30% of cash purchases.

iii) The appellant prays that the addition of Rs.4,70,82,615/- confirmed by the CIT(A) on account of alleged bogus purchases may be deleted.

4. The revised grounds of appeals filed by the revenue read as under:

(ia) Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was correct in holding that the Assessing Officer had not given any justification for addition u/s 69C of the Act in spite of fact that the assessee explained the modes operandi of obtaining the bogus bill in his statement recorded u/s 131 of the Act on 31.10.2012 as well as all the notices u/s 133(6) issued to all the disputed purchase parties were received unserved and the assessee failed to produce any of such parties before the Assessing Officer for examination.

(ib) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in stating that the Assessing Officer failed to establish that the unaccounted money had been spent by the assessee on the impugned purchases at the time of obtaining bogus bills from the disputed purchase

parties without appreciating the fact that the assessee himself admitted in his statement u/s 131 on 31<sup>st</sup> October, 2012.

(ii) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in restricting the addition made u/s 69C to 30% of the disputed purchase as against the peak credit of the purchases worked out by the Assessing Officer.

iii) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in admitting the additional evidence in the light of Rule 46A without appreciation the fact that sufficient opportunity of furnishing the evidence was provided to the assessee during the course of assessment proceedings. Assessee was categorically asked vide order sheet entry dated 13.09.2013, 23.09.2013, 10.01.2013 & show cause notice dated 18.11.2013 to furnish the documentary evidences in the form of purchases bills/invoices, lorry receipt, GRN, weightment slip and delivery challan to prove the genuineness of the claim, however, assessee failed to furnish the require details.

5. In a nutshell, the facts are that the assessee, proprietor of M/s Leo Gems filed his return of income for the AY 2009-10 on 29.09.2009 declaring total income of Rs.11,71,326/-. The assessee was engaged in the import/export of precious stone, diamond. The AO received information from the Sales Tax Department, Government of Maharashtra that the assessee had taken bogus bills from the following hawala dealers:

Sr. No	Name of Hawala Dealer	TIN Number	Financial Year			Total Amount
			2008-09	2009-10	2010-11	
1	Takshil Trading Pvt. Ltd.		4,385,000	-	-	4,385,000
2	Siddivinayak Corporation		16,13,33,024	-	-	16,133,024
3	Blue Nile Enterprises	273405480975V	20,331,147	62,649,399	5,968,864	88,949,410
4	Rajeshwari Trading Pvt. Ltd		6,001,209	-	-	6,001,209
5	Manibhadra Trading Co	27670243292V	5,046,736	35,333,692	14,243,398	54,623,826
6	P K Trading Co		92,124,763	-	-	92,124,763
7	N B Enterprises			6,090,748	-	6,090,748
8	Mahavir Corporation	27540501626V		78,681,304	40,277,879	118959183
9	Rashmi Enterprises	27580657871V		46,186,760	88,830,266	135017026
10	Deep Enterprises	27750595164V		19,960,389	20,244,108	40204497
11	Magnum Enterprises	27850669023V		19,085,485	33,214,172	52299657
12	Payal Enterprises	21870658730V		23,117,480	14,976,555	38094035
13	Aayushi Enterprises			1,693,710	-	1,693,710
14	G R Trade Link	27710642619V		-	12,532,989	14,243,398
15	Raj International			-	2,770,000	2,770,000
	Total		144,021,879	292,798,967	233,058,231	671,589,486

Further, during the course of enquiry, it was found that M/s Leo Gems had also taken accommodation entry from the following two parties:

Sr. No.	Name of the Hawala Dealer	TIN Number	Financial Year			Total Amount
			2008-09	2009-10	2010-11	
1	Bhakti Trading Co	27530012024V	48,61,735	4,34,08,766	5,19,52,000	10,02,22,501
2	Anmol Industries	27420506930V	-	-	1,99,42,109	1,99,42,109
					Total	12,01,54,610

5.1 The Investigation Wing of the Income Tax Department carried out an inquiry u/s 131 on 31.10.2012 in the case of the assessee. The AO has reproduced the relevant portion of the statement given by the assessee during the above inquiry proceedings and it reads as under:

“Q.70 Please state whether the purchases were made in cash or cheque?

Ans. In so far as imports are concerned, the total payment was in cheque. As far as local purchases are concerned, they were sometime in cash and some time in cheque. It is pertinent to mention that out of total purchases, 50% of the diamonds were purchased through import. Out of the remaining 50% local purchases, 30% local purchases in cash and 20% local purchases by cheque.

Q.71 Please slates the modus operandi of local purchases in cash?

Ans. Since I was new comer in the business, I was looking for cheap stock (diamonds) for trading. Few parties in the market are available, who provide the stock for cash at relatively cheaper than the parties who take payments in cheque. Hence to increase my profit margin I was making cash purchases.

However, since I was exporting and had to receive Kimberley certificate (KP Certificate) I was required to submit the copy of purchase bills. As mentioned I had made purchases without any bill and for the purposes of obtaining KP certificate, I used to search for parties who could provide entries/purchase bills corresponding to the cash purchase which I had made.

Q.72 Please provide the name and address of the parties through whom you have obtained these bills corresponding to your cash purchases?

Ans. There was a person named Umesh Jain (pet name 'moksh') having office in a pancharatna at 4<sup>th</sup> floor (a rented premise) were arranging bills against which no purchase were made from those parties. We were paying him cheque and he was returning the cash after deducting the Vat charges of 1% and his commission of 0.25%. However, there were actual purchases in cash.

Q.73 Please name the parties from whom purchase bills have been obtained corresponding to cash purchases?

Ans. The names are :- M/s Payal Enterprises. Manibhadra trading co, Rashmi enterprises, Blue Nile enterprise, Magnum enterprises, Mahavir corporation. Deep enterprises, G R. trade link, Takshil trading Pvt. Ltd, Siddhtvinayak corporation, Rajeshwah Trading Pvt. Ltd, PK Trading, NB Enterprise, Aayushi enterprise, Raj international, Bhakti trading Co and Anmol Industries.

Q.74 who has introduced you to the mechanism of cash purchases?

Ans. My maternal uncle Shri Naresh Shah had introduced to me the mechanism of cash purchases. Shri Naresh Shah introduced to me Shri Umesh Jain (pet name Moksh) who was indulged in cash purchase mechanism.

Q.76 Please name the parties from whom purchases were made in cash?

Ans. (1) M/s Bhumika Gems, at Pratik arcade, first floor, opera house, Mumbai.

2) Shri Shailesh Shah who is broker for various parties situated at Surat.

3) Shri Ramesh Vora who is broker for various parties situated at Surat.

Q. 77 please state value and quantum of diamond you purchased from M/s Bhumika Gems, Mumbai in cash? The details should be provided year-wise?

Ans. I do not have quantum wise details. Also I do not have year-wise details in respect of cash purchases of diamonds from M/s Bhumika Gems. However total cash purchases made from M/s Bhumika Gems from year 2010 to 2012 were to the tune of Rs.25 crores approx...

Q. 78 Please name the person with whom you dealt with in M/s. Bhumika Gems?

Ans. Mr. Mahesh Waghani one of the partners of M/s Bhumika Gems used to deal with me.

Q. 79 who had handed over to you the polished diamonds and had taken the cash from you against the diamonds supplied in respect of M/s Bhumika Gems.

Ans. Mr. Mahesh Waghani one of the partner of M/s Bhumika Gems had handed over me the polished diamonds He had also received the cash from me in respect of diamonds supplied to me.

Q.80 please state the year wise purchases made in cash from each parties?

Ans. I do not have the details as we used to make cash purchases, so after paying cash we used to destroy the slip/jangad.

Q. 81 What was the modus operandi of payment to parties from whom cash purchases were made?

Ans. On requisition from us to bill provider in respect of quantity of diamonds and rate of diamonds (the said details had to be given by me), the bill provider used to issue the bill mentioning the ct and rate of diamonds. Against the said bill issued by bill provider we used to issue them cheque or RTGS on account of bill issued by them as per our payment position. Against the said cheques or RTGS the bill provider used to give back cash after deducting VAT and 0.25% his commission charges. The cash received from the bill provider had been used for cash diamond purchases "

5.2 During the course of assessment proceedings, the AO vide order sheet noting dated 10.10.2013 asked the assessee to furnish bills/vouchers of the above parties, delivery challans, good receipt, weighment note. Also the AO requested the assessee to produce the above parties along with their books of accounts for verification.

In response to it, the assessee could file before the AO, the ledger accounts of few parties, stating that all the records had been impounded by the department. The AO noted that the assessee failed to produce any party and also failed to furnish the other details.

5.3 During the course of assessment proceedings, the AO issued notice u/s 133(6) by speed post to the above parties in order to verify the transactions. However, the said notices were returned back by the postal authorities with the remark "unclaimed".

5.4 From the above facts, the AO arrived at the following finding:

(a) the primary onus is on the assessee to establish the genuineness of purchases and sales;

(b) since the primary facts are in the knowledge of the assessee, it is his duty to provide the correct address or contract detail of the alleged suppliers;

(c) if the investigation done by the department leads to doubt regarding the genuineness of the purchase, it is incumbent on the assessee to produce the parties along with necessary documents to establish the genuineness of the transaction;

(d) payment by account payee cheque is not sacrosanct.

5.5 In view of the above facts, the AO came to a finding that the assessee is rotating his funds in the business. Accordingly, he calculated the peak credit and made an addition of Rs.6,80,85,951/- on account of bogus purchase.

6. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) found that the assessee *vide* affidavit dated 22.03.2013 (after four and ½ month) retracted his statement on the basis that his statement earlier given on oath u/s 131 before the DDIT (Inv.), III (1), Mumbai on 31.10.2012 was given under mental disturbance and claimed that his purchases were genuine. The Ld. CIT(A) has extracted the relevant para of the assessee's affidavit dated 22.03.2013 which reads as under:

“During the said period I used to effect purchase locally as well as by import. I used to effect sales locally as well as by export. In the course of business I had exported goods inter alia to one party, namely East West Traders situated at Hong Kong. Unfortunately, the said party became insolvent, as a result of

which INR 15 Crores became irrecoverable. Loss of such a huge magnitude compelled me to close down the said business of Leo Gems. The said loss also caused the following grave effects

- 1) I was totally collapsed & wrecked mentally & physically; I developed suicidal tendency in me.
- 2) Since I lost such outstanding I became unable to pay to the suppliers; this completely destroyed & demolished my standing in the market
- 3) My creditors started abusing & infact to my life. Hence I had to lodge a complaint in VIP Road Police station on 7<sup>th</sup> September 2012.
- 4) The creditors have obtained from me a document wherein it is stated that documents of my properties shall be surrendered to them in lieu of my debt.
- 5) All above factors have caused unbearable strain disturbance, tension and all other negative effects which have wrecked me completely at my young age of 26 years.

In the midst of all such mess, severe mental disturbance and chaos, on the October; the officers of the investigation wing of the Income Tax Department came to my residence with summons u/s 131 of the Income Tax Act, 1961 to make some inquiries regarding my business of Leo Gems. They took me to Scindia House 9a.m and confined me in their office till about 4p.m of the next day. They kept me there for approx 30 hours and asked me several question. I was terribly frightened, more because of unbearable loss in my business, pressure of creditors, threat on my life, menial disturbance & physical weakness. I was not at all in proper frame of mind.

I was extremely confused & exhausted when my statement was recorded. I was not in a position to answer any question properly. I did not realize

anything correctly. As a matter of fact, on retrospective thinking, I feel the so called voluntary statement was recorded under coercion & pressure. I signed the statement without understanding the content thereof in real perspective. It was recorded without understanding the facts of the case.

Now it has come to my understanding that on the basis of my above referred so called voluntary statement the Tax Department intends to make huge addition on account of purchases.

In this regard, I state that the purchases are genuine because there cannot be export and sales to established & reputed parties without corresponding purchases. Payment of purchases have been made by account payee cheques.

Making addition on the basis of statement recorded under coercion & compelling circumstances and without understanding the facts of the case & the system of trade, would be void & invalid. Infact, I am making this affidavit (as be it after the lapse of time), immediately on coming to know about baseless and without any ground.”

6.1 During the course of appellate proceedings before the Ld. CIT(A), the assessee filed various details, documents and retraction statement to support the genuineness of his purchases. The Ld. CIT(A) sent a copy of the above documents to the AO for submission of a remand report, after examining the above documents.

Having examined the assessment order, the remand report, and the submission of the assessee, the Ld. CIT(A) found that the disputed parties did not respond to notices u/s 133(6) and the assessee failed to produce the above parties before the AO for examination and there is no conclusive proof that the assessee had made the purchases from such parties or any other parties. Therefore, the Ld. CIT(A) held that only the

profit element on the disputed purchases could be brought to tax. Therefore, relying on the decision in *Bholanath Poly Fab. Pvt. Ltd.* 355 ITR 290 (Guj), *Kachwala Gems v. JCIT* 288 ITR 10 (SC), *CIT v. Simit Sheth* (2013) 38 taxmann.com 385 (Guj), *Vijay Proteins* 58 ITD 428, the Ld. CIT(A) directed the AO to restrict the disallowance to 30% of the disputed purchases. Thus it comes to Rs. 90,58,645/- (30% of Rs. 3,01,95,484/-) for AY 2008-09, Rs.4,70,82,615/- (30% of Rs.15,69,42,051/-) for AY 2009-10, Rs.8,90,49,891/- (30% of Rs.29,68,32,972/-) for AY 2010-11 and Rs.9,14,85,702/- (30% of Rs.30,49,52,341/-) for AY 2011-12.

7. Before us, the Ld. counsel of the assessee files a Paper Book (P/B) containing the decision in *M/s Andaman Timber Industries v. Commissioner of Central Excise, Kolkatta-II* (Civil Appeal No. 4228 of 2006) (SC), *H.R. Mehta v. ACIT* (ITA No. 58 of 2001) (Bombay High Court), *CIT v. M/s Ashish International* (ITA No. 4299 of 2009) (Bombay High Court), *Pratik Enterprises v. ITO* (ITA No. 2505/Mum/2017) (ITAT 'SMC' Bench, Mumbai), *M/s Naitik Gems v. ITO* (ITA No. 4760/Mum/2017) (ITAT 'SMC' Bench Mumbai), *ITO v. Ratnalaya Diamonds Pvt. Ltd.* (ITA No. 3760/Mum/2016) & *Ratnalaya Diamonds Pvt. Ltd. v. ITO* (CO No. 162/Mum/2017) (ITAT 'C' Mumbai), *ACIT v. M/s Jaipur Jewels* (ITA No. 1699/Mum/2017) (ITAT 'J' Bench Mumbai), *ACIT v. M/s Say India Jewellers* (ITA No. 6735/Mum/2010) (ITAT 'E' Bench Mumbai), *Amy Diam Vega Jewellery Pvt. Ltd. v. DCIT* (ITA No. 5799, 5800, 5801/Mum/2016) (ITAT 'J' Bench Mumbai), *ACIT v. M/s Choron Diamond (I) Pvt. Ltd.* (ITA No. 4449, 6798 and 6800/Mum/2016) (ITAT

'H' Bench Mumbai), *M/s Akash Purochem Pvt. Ltd. v. ITO* (ITA No. 505/Mum/2016) (ITAT 'G' Bench Mumbai) and *ITO v. Ashok V. Viradia* (2017) 87 taxmann.com 156 (Mumbai-Trib).

7.1 The Ld. counsel also filed another P/B containing the report of the task group for a diamond sector to make India an 'International Trading Hub for Rough Diamonds' and the decision in *CIT v. Simit P. Sheth* (2013) 356 ITR 451 (Guj), *CIT v. Nikunj Eximp Enterprises Pvt. Ltd.* (2015) 372 ITR 619 (Bom), *DCIT v. Shri Rajeev G. Kalathil* (ITA No. 6727/Mum/2012) (ITAT 'D' Bench Mumbai), *M/s Geolife Organics v. ACIT* (ITA No. 3699/Mum/2016) (ITAT 'F' Bench Mumbai).

8. *Per contra*, the Ld. DR relies on the decision in *N.K. Proteins Ltd. v. DCIT* (2017-TIOL-23-SC-IT), *Surjeet Singh Chhabra v. UoI*, order dated 25.10.1996 (SC), *CIT v. Precision Finance Pvt. Ltd.*, order dated 14.06.1993 (Calcutta High Court), *CIT v. M/s Jansampark Advertising & Marketing (P) Ltd.* (ITA No. 525/2014) (Delhi High Court) and *Hiralal Maganlal & Co.* (2005) 96 ITD 113 (Mum).

The Ld. DR also relies on the decision in *CIT v. D.K. Garg* (2017) 84 taxmann.com 257 (Delhi), *ACIT v. Hukum Chand Jain* (2010) 191 Taxman 319 (Chhattisgarh).

9. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

9.1 We begin with the decisions relied on by the Ld. counsel of the assessee. We group together similar cases.

In *M/s Andaman Timber Industries* (supra), it has been observed that “not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounted to violation of principles of natural justice because of which the assessee was adversely affected”.

In *H.R. Mehta* (supra), the issue was the addition at the time of re-assessment without having given the assessee an opportunity to cross-examine the deponent on the statements relied upon by the AO.

In *M/s Ashish International* (supra), the Tribunal has recorded a finding of fact that the assessee had disputed the correctness of the statement and admittedly the assessee was not given any opportunity to cross-examine the concerned Director of M/s Thakkar Agro Industrial Chem Supplies P. Ltd. who had made the statement.

In the instant case, the letters issued by the AO u/s 133(6) were returned back by the postal authorities with the remark ‘unclaimed’. The AO had issued the said notices in the address given by the assessee. Also the assessee could not produce before the AO the disputed parties. These facts have been mentioned by the AO at para 5.7 and 5.6 of the assessment order. The assessee has not challenged the above facts either before the Ld. CIT(A) or before us. As the assessee failed to file before the AO the correct address of the disputed parties and also could not produce them before the AO, the question of cross-examination

simply does not arise. Therefore, the case of the assessee is distinguishable from the above decisions relied on by the Ld. counsel.

9.1.1 Now we turn to the order of the Tribunal relied on by the Ld. counsel.

In *Pratik Enterprises* (supra), the assessee was trading in iron and steel. The AO estimated profit @ 25% on the bogus purchases which was reduced to 12.5% by the Ld. CIT(A). The Tribunal, keeping in mind the nature of business, restricted the disallowance to 6.5% of such bogus purchases.

In *M/s Naitik Gems* (supra), the assessee was a partnership firm engaged in the business of trading and export of diamonds. The AY was 2009-10. The AO estimated the profit @ 6% on bogus purchase of diamonds which was reduced to 3% by the Ld. CIT(A). The Tribunal confirmed the above estimation made by the Ld. CIT(A).

In *Ratnalaya Diamonds Pvt. Ltd.* (supra), the assessee was engaged in the business of diamond trading. The AY was 2007-08. The AO made an addition of Rs.50,92,535/- towards bogus purchase on peak basis. The Ld. CIT(A) restricted the disallowance by estimating the profit @ 6% on the alleged bogus purchases, relying on the CBDT Instruction No. 2/2008 dated 22.02.2008. The Tribunal upheld the above order of the Ld. CIT(A).

In *M/s Jaipur Jewels* (supra), the assessee was engaged in the business of manufacturing and trading of precious and semi-precious

stones and jewellery. The AO made an addition of Rs.1,67,45,412/- towards bogus purchases, which was reduced to 5% of such purchases by the Ld. CIT(A). The Tribunal upheld the order of the Ld. CIT(A).

In *M/s Say India Jewellers* (supra), the assessee was a manufacturer of studded jewellery. The AO made an addition of Rs.1,27,98,022/- towards bogus purchases, which was deleted by the Ld. CIT(A) on the reason that there was no credible basis for the AO to hold such purchases as bogus. The Tribunal upheld the order of the Ld. CIT(A).

In *Amy Diam Jewellery Pvt. Ltd.* (supra), the AO estimated the profit @ 8% of the bogus purchases, which was restricted to 4% by the Ld. CIT(A). The Tribunal upheld the order of the Ld. CIT(A).

In *M/s Choron Diamond (I) Pvt. Ltd.* (supra), the Ld. CIT(A) restricted the disallowance to 4% of the bogus purchases for the AY 2007-08 and 3% for the AY 2008-09, 2010-11, 2011-12 and 2013-14. The Tribunal directed the AO to estimate the profit @ 2% uniformly for the above assessment years.

In *M/s Akash Purochem Pvt. Ltd.* (supra) and *Ashok V. Viradia* (supra), the Tribunal has restored the matter to the file of the AO to make a fresh assessment order after examining the concerned parties and giving opportunity of cross-examination to the assessee.

In *Shri Rajeev G. Kalathil* (supra), the Tribunal at para 2.4 held the following:

“2.4. We have heard the rival submissions and perused the material before us. We find that AO had made the addition as one of the supplier was declared a hawala dealer by the VAT Department. We agree that it was a good starting point for making further investigation and take it to logical end. But, he left the job at initial point itself. Suspicion of highest degree cannot take place of evidence. He could have called for the details of the bank accounts of the suppliers to find out as whether there was any immediate cash withdrawal from their account. We find that no such exercise was done. Transportation of good to the site is one of the deciding factor to be considered for resolving the issue. The FAA has given a finding of fact that part of the goods received by the assessee was forming part of closing stock. As far as the case of Western Extrusion Industries. (supra) is concerned, we find that in that matter cash was immediately withdrawn by the supplier and there was no evidence of movement of goods. But, in the case before us, there is nothing, in the order of the AO, about the cash. Secondly, proof of movement of goods is not in doubt. Therefore, considering the peculiar facts and circumstances of the case under appeal, we are of the opinion that the order of the FAA does not suffer from any legal infirmity and there are not sufficient evidence on file to endorse the view taken by the AO. So, confirming the order of the FAA, we decide ground no.1 against the AO.”

In *M/s Geolife Organics* (supra), the assessee was engaged in the business of trading in ferrous and non-ferrous metals. The AO, relying on the decision in *Simit P. Sheth* (supra) estimated the profit @ 12.5% of the alleged bogus purchases of Rs.1,41,39,565/- which worked out to Rs.17,67,445/-. In appeal, the Ld. CIT(A) confirmed the above order of the AO. In further appeal, the Tribunal directed the AO to restrict the disallowance to 2% of such purchases.

9.1.2 In *Simit P. Sheth* (supra), the AO found that the total purchase of Rs.41,04,903/- cumulatively made from the three parties were bogus. The Ld. CIT(A) restricted the disallowance to 30% of the purchases as the probable profit of the assessee. The Tribunal restricted the disallowance to 12.5% of the bogus purchases, which was confirmed by the Hon'ble High Court.

9.1.3 In *Nikunj Eximp Enterprises Pvt. Ltd.* (supra), the AO disallowed an expenditure of Rs.1.33 crores on account of purchases from seven parties on the ground that they were not genuine, which was upheld by the Ld. CIT(A). In further appeal, the Tribunal recorded that the assessee had filed letters of confirmation of suppliers, copies of bank statement showing entries of payment through account payee cheques to the suppliers, copies of invoices for purchases and a stock statement, i.e. stock reconciliation statement. This reconciliation statement gave complete details with regard to the opening stock, purchases, sales and closing stock and no fault was found with regard to it. Besides, a substantial part of the sales made by the assessee was to the Government Department, and such sales could not be bogus. The books of account of the assessee had not been rejected. On these facts, the Tribunal deleted the disallowance of Rs.1.33 crores holding that the purchases were not bogus. On appeal, the Hon'ble High Court held that "there were confirmation letters filed by the suppliers, copies of invoices for purchases as well as copies of bank statements all of which would indicate that the purchases were in fact made. Merely because the

suppliers had not appeared before the AO or the CIT(A), one could not conclude that the purchases were not made by the assessee.”

In the instant case, the assessee was asked by the AO *vide* order sheet noting dated 10.10.2013 to furnish bills/vouchers of the disputed parties, delivery challans, goods receipt, weighment note and also to produce the parties along with their books of accounts for verification. However, the assessee could file only the ledger accounts of few parties on the contention that all records were impounded by the department. The assessee failed to produce the said parties before the AO for examination. Also the notices issued by the AO u/s 133(6) through speed post to the disputed parties were returned back by the postal authorities with the remark ‘unclaimed’. The AO had issued the notices in the address furnished by the assessee. In view of the above facts, the case of the assessee is distinguishable from the above decision relied on by the Ld. counsel.

9.1.4 The Ld. counsel of the assessee files a copy of the Report of the Task Group for diamond sector to make India ‘International Trading Hub for Rough Diamonds’. In order to protect the genuine interest of diamond industry, the Department of Commerce, Government of India constituted a Task Group for the diamond sector to suggest measures to increase the diamond trade. The Task Group has made a number of recommendations for the growth of diamond sector to be considered for implementation by the Government. The Task Group suggested that :

“While the industry would like Presumptive Taxation regime in the long run, it would request the finance ministry to start by reducing the net profit rate for computation of Income Tax under the Benign Assessment Procedure (BAP) introduced in 2007-08, from 6.0% to 2.5% so that exporters are encouraged to opt for the same which is not the case now as the BAP has remained a scheme on paper only. Observing the interest of taxpayers, size of tax collection and compliance a Block Benign Taxation Regime may be introduced in future. This measure will be tax accretive with a realistic threshold rate.”

9.2 Now we turn to the decisions relied on by the Ld. DR. In *N.K. Proteins Ltd.* (supra), during the course of search proceedings at the office premises of NKPL, blank signed cheque books and vouchers of number of concerns were found. Accordingly, the purchases made from these concerns were treated as bogus purchases by the AO and the entire deposits in bank accounts of these parties were treated as assessee's income on protective basis. On appeal, the ITAT restricted the addition on account of alleged bogus purchases at Rs.25% i.e. Rs.73,23,322/- of the total purchases amounting to Rs.2,92,93,288/-. On further appeal, the Hon'ble High Court modified the order of Tribunal and directed for addition of entire bogus purchases. Then the Hon'ble Supreme Court dismissed the SLP filed by the assessee and confirmed the decision of the High Court for addition of entire income for account of bogus purchases.

In the instant case, there was no search proceeding nor any blank signed cheque book, voucher have been found. So the present case is distinguishable from the above decision.

9.2.1 In *Surjeet Singh Chhabra* (supra), the appellate authority had initially referred back the matter to the primary authority to reconsider the matter in the light of the decisions issued in that order. After reconsideration, the confiscation order was passed in respect of the gold and in respect of two items, i.e. FAX machine and video camera and compounding fee was ordered. On appeal, it was confirmed and on revision it was also confirmed. The petitioner filed a writ petition in the High Court. The Hon'ble High Court vide order dated January 30, 1996 summarily dismissed the writ petition. In further appeal, while disposing the Special Leave Petition, the Hon'ble Supreme Court held that:

“It is true that the petitioner had confessed that he purchased the gold had brought it. He admitted that he purchased the gold and converted it as a Kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily as opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of the confession made by him, it binds him and, therefore, in the fact and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The Customs officials

are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner.”

The above decision relates to contravention of the Customs Duty Act and also FERA. This is not so here. Thus the instant case is distinguishable from the above decision.

9.2.2 In *Precision Finance Pvt. Ltd.* (supra), the issue was whether the Tribunal was justified in law in deleting the addition of Rs.5,64,631/- and Rs.4,84,205/- as unexplained credits and interest thereon for AYs 1978-79/1979-80, respectively. The Hon’ble High Court concluded that :

“5. It is for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. In our view, on the facts of this case, the Tribunal did not take into account all these ingredients which have to be satisfied by the assessee. Mere furnishing of the particulars is not enough. The enquiry of the Income-tax Officer revealed that either the assessee was not traceable or there was no such file and, accordingly, the first ingredient as to the identity of the creditors had not been established. If the identity of the creditors had not been established, consequently the question of establishment of the genuineness of the transactions or the creditworthiness of the creditors did not and could not arise. The Tribunal did not apply its mind to the facts of this particular case and proceeded on the footing that since the transactions were through the bank account, accordingly, it is to be presumed that the transactions were genuine. It was not for the Income-tax Officer to find out by making investigation from the bank accounts unless the assessee proves the identity of the creditors and their creditworthiness. Mere payment by account payee cheque is not sacrosanct nor can it make a non-genuine transaction genuine. In that view of

the matter, the question before us is answered in the negative and in favour of the Revenue.”

9.2.3 In *M/s Jansampark Advertising & Marketing (P) Ltd.* (supra) the Hon’ble High Court held that :

“42. The AO here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But CIT (Appeals), having noticed want of proper inquiry, could not have closed the chapter simply by allowing the appeal and deleting the additions made. It was also the obligation of the first appellate authority, as indeed of ITAT, to have ensured that effective inquiry was carried out, particularly in the face of the allegations of the Revenue that the account statements reveal a uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question. This necessitated a detailed scrutiny of the material submitted by the assessee in response to the notice under Section 148 issued by the AO, as also the material submitted at the stage of appeals, if deemed proper by way of making or causing to be made a “further inquiry” in exercise of the power under Section 250(4). This approach not having been adopted, the impugned order of ITAT, and consequently that of CIT (Appeals), cannot be approved or upheld.”

9.2.4 In *D.K. Garg* (supra), the assessee was a Chartered Accountant. The AO issued notice u/s 148 regarding his income that escaped assessment. The assessee had given a statement in writing that he was in the business of providing entries to the parties who were in need for the same and the entries were routed through agriculture companies. In the assessment order the AO noted that the assessee was not in a position to prove the source of deposits made in his bank accounts.

Wherever the assessee was able to show that the corresponding issuance of cheque therefrom was to the same person, the benefit of the principle of 'peak credit' was given to him by the AO. Where, however, the source of the deposit and the issuance of the cheque was explained and could not be 'squared off', the AO treated the deposits as the assessee's income and added it to the return income. This action of the AO was upheld by the CIT(A). On second appeal, the Tribunal disapproved of the AO having worked out the peak credit separately for the cheques issued by the three companies and, according to the Tribunal the entire approach adopted by the revenue authorities betrays lack of understanding of basic accounting principles. The Tribunal also found that there was a contradiction in the findings of the AO and CIT(A) in as much as, even after finding that the three companies were non-existent, the peak credits had been worked out separately for cash deposits and cheques issued by the companies. The Tribunal thus restricted the addition to peak credit as worked out by the assessee. On appeal, the Hon'ble High Court held that where assessee, an accommodation entry provider, was unable to explain all sources of deposits and corresponding payments, he would not be entitled to the benefit of peak credit.

9.2.5 In *Hukum Chand Jain* (supra), search and seizure operations were conducted at the business and residential premises of the assessee. In course of search, statement of the assessee was recorded u/s 132(4), wherein he surrendered Rs.30 lakhs as undisclosed income for the block period and offered that whatever taxes would be worked out on the

surrendered income, he was prepared to pay the same. However, in response to the notice issued u/s 158BC, he offered only Rs.3,52,000/- in his case and the aggregate amount of Rs.2,05,500/- in the case of his three sons as their undisclosed income. The AO, however, completed the assessment by including the amount of undisclosed income offered by the assessee besides specific additions based on material, which could not be explained by him. On appeal, the CIT(A) deleted the addition. The Tribunal dismissed the revenue's appeal holding that confessional statements made during the search are often vulnerable, as the person making such statements remains under great stress and strain and he does not have relevant details, documents and books of account and in the absence of the same, precise computation relating to mode of utilization of such income and year of investment cannot be clearly furnished. On the revenue's appeal, the Hon'ble High Court held that when assessee did not retract his statement immediately after search and seizure was over and in return also no explanation was offered for surrender of undisclosed income at the time of search and seizure operations u/s 132(4), it could be said that the assessee had failed to discharge the onus of proving that confession made by him u/s 132(4) was as a result of intimidation, duress and coercion or that same was made as a result of mistaken belief of law or facts. Therefore, it held that the AO was justified in assessing income of assessee on basis of surrender of undisclosed income made by the assessee u/s 132(4).

9.2.6 In *Hiralal Maganlal & Co.* (supra), it is held that the assessee, having made a voluntary declaration on oath and induced departmental

authorities to act upon same at the time of search, cannot be permitted to turn around later and deny truth of the said declaration or representations made therein.

9.3 At this juncture, we remind ourselves that a precedent is an authority only for what it actually decides and not for what may remotely or even logically follow from it; and a decision on a question that has not been argued cannot be treated as a precedent. Judgments must be read as a whole and observations in judgments should be considered in the context in which they are made and in the light of the questions that were before the court. In *CIT v. Sun Engineering Works Pvt. Ltd.*, 198 ITR 297, the Hon'ble Supreme Court observed:

“It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Supreme Court divorced from the context of the question under consideration and treat it to be the complete law declared by the court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the court. A decision of the Supreme Court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, courts must carefully try to ascertain the true principle laid down by the decision.”

The above decision has been followed in *CIT v. Late Begum Noor* 204 ITR 166, *Chamber of ITC v. CBDT* 209 ITR 660 and *CIT V. Sudhir* 214 ITR 154. Similar is the position of law in the context of a decision by the High Court and Tribunal.

We have mentioned hereinbefore the ratio laid down in the decisions relied on by both sides. Now our endeavour would be to apply the relevant decisions to the facts of the case.

We mention here that the decisions relied on by the Ld. DR wherein search and seizure actions have taken place stand on a different pedestal from the instant case, and thus distinguishable.

The fact remains that the assessee admitted about bogus purchases made by him while answering to the questions recorded on oath u/s 131 by the Deputy Director of Income Tax (Inv), III(1), Mumbai on 31.10.2012. Thereafter, the assessee filed an affidavit dated 22.03.2013 pleading that his statement on 31.10.2012 was given under mental disturbance and he claimed that his purchases were genuine. The above statements have been extracted by us at para 5.1 and 6 hereinbefore.

Also there is no denying the fact that the notices sent by the AO u/s 133(6) through speed post were returned back by the postal authorities with the remark 'unclaimed'. The AO had sent these notices in the address given by the assessee. The AO had asked the assessee to produce the said parties before him along with books of accounts for examination. The assessee failed to produce them before the AO.

It is the duty of the assessee to furnish the complete address of such persons. It has been rightly held in *Precision Finance Pvt. Ltd.* (supra), that (i) if the identity of the creditors had not been established, consequently the question of establishment of the genuineness of the

transactions or the creditworthiness of the creditors did not and could not arise, (ii) mere payment by account payee cheque is not sacrosanct nor can it make a non-genuine transaction genuine.

In such a scenario, the ratio laid down in *Simit P. Sheth* (supra) is applicable. It has been held therein that not the entire purchase price but only the profit element embedded in such purchases could be added to the income of the assessee. This is applicable in a case where the purchases have been made through non-genuine parties.

9.3.1 The Ld. counsel has relied upon the report of the task group for diamond sector to make India an “International Trading Hub for Rough Diamonds”. Therein it has been suggested that the net profit rate be reduced to 2.5% for computation of income.

9.3.2 Contextually, we refer to the decisions of the Tribunal in the case of the assessee having similar type of business. Those decisions have been filed by the Ld. counsel. In *M/s Naitik Gems* (supra), the assessee was a partnership firm engaged in the business of trading and export of diamonds. The Tribunal has confirmed the profit @ 3% on bogus purchases.

In *Ratnalaya Diamonds Pvt. Ltd.* (supra), the assessee was engaged in the business of diamond trading. The Ld. CIT(A) restricted the disallowance by estimating the profit @ 6% on the alleged bogus purchases, relying on the CBDT Instruction No. 2/2008 dated 22.02.2008. The Tribunal upheld the above order of the Ld. CIT(A).

In *M/s Jaipur Jewels* (supra), the assessee was engaged in the business of manufacturing and trading of precious and semi-precious stones and jewellery. The Tribunal upheld the profit @ 5% on bogus purchases.

In *Amy Diam Jewellery Pvt. Ltd.* (supra), the AO estimated the profit @ 8% of the bogus purchases, which was restricted to 4% by the Ld. CIT(A). The Tribunal upheld the order of the Ld. CIT(A).

In *M/s Choron Diamond (I) Pvt. Ltd.* (supra), the Tribunal directed the AO to estimate the profit @ 2% on bogus purchases.

9.3.3 Considering the nature of business of the assessee in the background of the decisions of the Tribunal delineated hereinbefore at para 9.3.2, we set aside the order of the Ld. CIT(A) and direct the AO to estimate the profit @ 5% on the disputed purchases for the AYs 2009-10, 2010-11 & 2011-12 recorded by the Ld. CIT(A) at para 6.10 of his appellate order dated 31.03.2016.

9.4 In the result, the appeals for the AYs 2009-10, 2010-11 & 2011-12 filed by the assessee are partly allowed, whereas the cross-appeals filed by the revenue are dismissed.

## **Part- 2**

10. Now we turn to AY 2008-09. The grounds of appeal filed by the assessee read as under:

- i) The Ld. CIT(A) erred on facts and in law in upholding (the addition made by the Assistant Commissioner of Income Tax, Central Circle - 13,

Mumbai (AO) on account of alleged bogus purchases to the extent of Rs.90,58,645/- as against the addition of Rs,1,61,12,971/- by holding that the appellant had himself admitted of having made purchase of diamonds in cash to the tune of 30% and hence it would be appropriate to adopt the suppressed profit @ 30% of the disputed purchases.

ii) The Ld. CIT(A) while confirming the addition of Rs.90,58,645/- on account of alleged bogus purchases, erred on facts and in law in holding that a disallowance u/s. 40A (3) would get attracted to tune of 30% of cash purchases.

iii) The appellant prays that the addition of Rs.90,58,645/- confirmed by the CIT(A) on account of alleged bogus purchases may be deleted.

**11. The revised grounds of appeals filed by the revenue read as under:**

(ia) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in holding that the Assessing Officer had not given any justification for addition u/s 69C of the Act in spite of fact that the assessee explained the modes operandi of obtaining the bogus bill in his statement recorded u/s 131 of the Act on 31.10.2012 as well as all the notices u/s 133(6) issued to all the disputed purchase parties were received unserved and the assessee failed to produce any of such parties before the Assessing Officer for examination,

(ib) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in stating that the Assessing Officer failed to establish that the unaccounted money had been spent by the assessee on the impugned purchases at the time of obtaining bogus bills from the disputed purchase parties without appreciating the fact that the assessee himself admitted in his statement u/s 131 on 31<sup>st</sup> October, 2012.

(iia) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in restricting the addition made u/s 69C to 30% of the disputed purchase as against the peak credit of the purchases worked out by the Assessing Officer.

iii) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in admitting the additional evidence in the light of Rule 46A without appreciation the fact that sufficient opportunity of furnishing the evidence was provided to the assessee during the course of assessment proceedings. Assessee was categorically asked vide order sheet entry dated 13.09.2013, 23.09.2013 & show cause notice dated 18.11.2013 to furnish the documentary evidences in the form of purchases bills/invoices, lorry receipt, GRN, weighment slip and delivery challan to prove the genuineness of the claim, however, assessee failed to furnish the require details.

12. In the assessment order for the AY 2008-09, the AO has mentioned at para 5.1 the information received from the Sales Tax Department in respect of financial years 2008-09, 2009-10 and 2010-11. On the basis of said information, the AO has made an addition of incremental credit of Rs.1,60,48,721/- towards bogus purchase for the AY 2008-09. In appeal the Ld. CIT(A) has restricted the disallowance to 30% of bogus purchases of Rs.3,01,95,484/- which comes to Rs.90,58,645/-.

13. A perusal of the assessment order dated 04.12.2013 passed by the AO clearly indicates that there was no information before him from the Sales Tax Department for the financial year 2007-08 towards bogus purchases by the assessee. The information related to subsequent three financial years. The AO has resorted to general propositions and made

an addition of Rs.1,60,48,721/-. Similarly, the Ld. CIT(A) has been guided by the general proposition and restricted the disallowance to Rs.90,58,645/-.

The view is quite settled that general propositions do not decide a concrete case. Therefore, we set aside the order of the Ld. CIT(A).

14. Consequently, the appeal for the AY 2008-09 filed by the assessee is allowed, whereas the cross-appeal filed by the revenue is dismissed.

15. To sum up, the appeals for the AYs 2009-10, 2010-11 & 2011-12 filed by the assessee are partly allowed, whereas the appeals of the revenue are dismissed.

The appeal for the AY 2008-09 filed by the assessee is allowed, whereas the appeal of the revenue is dismissed.

**Order pronounced in the open Court 27/06/2018.**

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

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 27/06/2018

*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**