

IN THE INCOME-TAX APPELLATE TRIBUNAL “A” BENCH MUMBAI  
BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER  
AND SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.1141/Mum/2018 (Assessment Year 2009-10)

Md. Rizwan Mohd Kallan Khan, Plot No. 603, Flat No.13, Bldg No. 7 D, Bombay Taxi Men’s Co-operative Society, LBS Marg, Kurla (West), Mumbai-400070 <b>PAN: AGJPK2270K</b>	Vs.	ITO 26(3)(4) Room No. 711, 7 <sup>th</sup> Floor, C-11, Pratyakshakar Bhavan, Bandra (East), Mumbai-51.
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Appellant

Respondent

Appellant by : Shri Vimal Punmiya (AR)  
Respondent by : Shri Rajesh Kumar Yadav (AR)  
Date of Hearing : 25.04.2018  
Date of Pronouncement : 31.05.2018

**ORDER**

**PER PAWAN SINGH, JUDICIAL MEMBER;**

1. The instant appeal by assessee under section 253 of the Income-tax Act (the Act) is directed against the order of Id. Commissioner of Income-tax (Appeals)-38 [Id. CIT(A)], Mumbai dated 10.10.2017 for Assessment Year 2009-10. The appeal before the Id. CIT(A) arise from the assessment order passed under section 143(3) r.w.s. 147 of the Act dated 25.03.2015.
2. Brief facts of the case are that the assessee is a proprietor of M/s Fahaid Enterprises, engaged in the business of Lubricant Oils, filed its return of income for relevant Assessment Year on 30.09.2009 declaring total income at Rs. 7,56,296/-. The return was processed under section 143(1) of the Act. Subsequently, on the basis of information received from the Sale Tax Department through DGIT (Investigation), Mumbai that assessee was

involved in non-genuine purchases/hawala transaction, the assessment was reopened. Therefore, notice under section 148 dated 19.03.2014 was served upon the assessee. In response to the notice under section 148, the assessee filed his reply dated 16.04.2014 requested to treat the original return of income in response to the notice under section 148. The assessing officer proceeded for re-assessment. The assessment was completed under section 143(3) r.w.s. 147 on 25.03.2015. The Assessing Officer while passing the re-assessment order treated the purchases from 12 parties of Rs. 2,91,36,808/- as non-genuine. The assessing officer made the addition of Rs. 36,42,101/-, being 12.50% of the alleged bogus purchases. Aggrieved by the order of AO, the assessee filed appeal before the Id. CIT(A). The Id. CIT(A) upheld the re-opening and enhance the addition from 12.5% to 100% of the alleged bogus purchases. Thus, further aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before us. The assessee has raised following grounds of appeal.

1. On the facts and circumstances of the case and in law the Ld CIT(A) erred in confirming the initiation of the reassessment proceeding under section 147.
2. On the facts and circumstances of the case and in law the Ld CIT(A) failed to consider that reassessment proceeding cannot be initiated.
  - a) No reassessment can be made just to make an enquiry or verification.
  - b) Reassessment proceeding cannot be initiate merely on the information received from investigation wing.
  - c) Reassessment proceeding cannot be initiated when the LD. CIT(A) have reason to suspect and not reason to believe.
3. On the facts and circumstances of case and law the Ld CIT(A) erred in confirming the assessment order under section 143 sub section 3 r w s 147 of income tax Act which is passed against the principal of natural justice.

4. The Ld CIT(A) erred in confirming and rejecting the books of accounts under section 145(3) of the Income Tax Act.
  5. The Ld CIT(A) erred enhancing the addition and added the entire genuine purchases of Rs.2,91,36,808 as unaccounted purchases/investments in view of section 69/69A and thereby erred in adding the same to the total income of the assessee as against made by the Ld AO at Rs.36.42.101/- being 12.5 percent of the total purchases of Rs.2,91,36,808/- as bogus non-genuine expenditure.
  6. The Ld. CIT(A) erred in confirming the charging of interest under section 234A, 234B and 234C of the Income Tax Act 1961.
  7. The Ld. CIT(A) erred in confirming the initiation of the penalty proceeding under section 274 r.w.s. 271(1)(c) of the Income Tax Act 1961.
3. We have heard Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue and perused the material available on record. Ground No.1 to 3 relates to validity of re-opening under section 147 of the Act. The Id. AR of the assessee submits that in absence of fresh material available on record the reopening is invalid. The AO has no fresh and tangible material on record to re-open the assessment. The allegation that purchases were made by assessee are bogus, is merely on the basis of list available at website of VAT/Sales Tax department, Government of Maharashtra. The “list of suspicious dealer” appeared on the website of the Sales Tax Department, Government of Maharashtra is not sufficient for making belief about the non-genuine purchases of the assessee. The re-opening of the assessment cannot be made with an intention to review the order. The assessee has disclosed all information related with the expenses for relevant Financial Year. There is no allegation in the reasons recorded that there was any failure on the part of assessee to disclose the primary material fact. The AO must have personal information in his possession. The

AO must form the belief and must too in the consequence of information. The reliance was made on the decision of Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India [256 ITR 1] and the decision of Hon'ble Delhi High Court in CIT vs. Sfil Stock Broking Ltd. [325 ITR 285]. The Id. AR of the assessee also submits that no proper opportunity was given by AO. No opportunity of cross-examination was given despite making request before the AO. On the other hand, the Id. DR for the Revenue supported the order of authorities below. The Id. DR for the Revenue submits that the AO was having sufficient information for the reason to believe that income is escaped assessment. The DGIT (Investigation) can inform the AO about the beneficiary, who were involved in the hawala transaction. The assessee was one of the beneficiaries who have availed benefit from the hawala dealer. The purchases shown by assessee are non-genuine purchases. In support of his submission, the Id. DR for the Revenue relied upon the decision of Hon'ble Supreme Court in case of CIT v. Rajesh Jhaveri Stock Broker (P.) Ltd. [(2007) 161 Taxman 316/291 ITR 500)].

4. We have considered the rival submissions of the parties and perused the material available on record. The AO made the reopening on the basis of information received from DGIT (Investigation), Mumbai through CIT(A)-21, forwarding the list of parties received from the Sales Tax Authorities, Government of Maharashtra investigated about the parties who were indulged in issuing bogus bill without making any sales and purchase and

delivery of goods. The assessment was re-opened within four year from the end of relevant Assessment Year. Admittedly, the assessment was processed under section 143(1) of the Act and no scrutiny assessment was undertaken. Hence, there is no occasion for review of the assessment. Therefore, there is no occasion for change of opinion. In our view, the case law relied by Id. AR in Kelvinator of India Ltd. (supra) is not applicable. The Hon'ble Apex Court in case CIT vs. Rajesh Jhaveri (supra) held that intimation under section 143(1) is not assessment and there is no question of treating re-assessment in such a case as based on change of opinion. In the case in hand, the information was received from DGIT (Investigation) about the hawala trader engaged in providing accommodation bill of sales or purchase without delivery of goods. The information is sufficient for reason to believe that income escaped from assessment. The Hon'ble Supreme Court in Rajesh Jhaveri Stock Broker (supra) held that section 147 authorized and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word 'reason' in the phrase 'reason to believe' will mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income has escaped assessment, it can be said to have 'reason to believe' that an income has escaped assessment. The said expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of

the Assessing Officer is to administer the statute with solicitude for the public exchequer with an in-built idea of fairness to taxpayers. Thus, in our view, the re-opening made by Assessing Officer was based on information received from DGIT (Investigation), which is sufficient to make a reason belief that income escaped assessment. Hence, the ground of appeal raised by assessee has no force and the same are dismissed.

5. Ground No.4 relates to rejecting the books of account. The Id. AR of the assessee has not argued anything against this ground of appeal. Thus, this ground of appeal is treated as not pressed and dismissed.
6. Ground No.5 relates to enhancing the addition to the extent of entire alleged bogus purchases. The Id. AR of the assessee submits that Assessing Officer added Rs. 36,42,101/-, which is 12.5% of total purchases of Rs. 2,91,36,808/-, to the income of assessee. However, the Id. CIT(A) added 100% of the alleged bogus purchases. During the relevant period, the assessee made purchases from 12 parties aggregating to Rs. 2,91,36,808/-. The assessee furnished all bills of purchases. All payments were made through Account Payee Cheque. All the suppliers provided all identity to their bankers following 'know your client' (KYC) norms. The assessee has shown stock register showing the quantity in the stock register. All the sales were accepted. Without purchases sales cannot be taken. Assessee's account is duly audited. All purchases bill has shown VAT Account, which is duly paid by assessee to the supplier. There is no evidence or allegation that cash

was received by assessee. The allegation that assessee inflated the profit through purchases. If the allegation of Assessing Officer that assessee inflated the purchases, the Gross Profit (GP) will lead to unexpected GP which is unpractical. The Assessing Officer merely relied upon the information of sales tax Department. The assessee purchases goods and non-compliance by supplier cannot impose hardship on the assessee. The Id. AR of the assessee submits the entire additions are liable to be deleted. In support of his submission, the Id. AR of the assessee made the following reliance on various points:

Sr. No.	Observation	Case Details
1	Suspicious cannot take place the evidence	DCIT v. Shri Rajeev G. Kalathil, (Mum) (Trib) (ITA No. 6727/M/2012 dt.20/8/2014 K.P. Varghese v. ITO, (1981) 131 ITR 579 (SC); CIT v. Roman & Co., (1968) : 67 ITR 11 (SC); CIT v. Calcutta Discount Co. Ltd.', (1973) 91 ITR 8 (SC); Umacharan Shaw & Bros v. CIT', (1959) 37 ITR 271 (SC)
2	Observation of Third party cannot be basis of addition. Satisfaction of AO is must:	ITO v/s Permanand [2008 25 SOT 11] ITO v. Vinod Kumar, Prop., Vinod Brothers, Sriganganagar, [ITA No. 623/Jodh. of 2005 ITO v/s Arora Alloys Ltd. [2012] [12 ITR (trib) 263]
3	Term Suspicious as M-VAT was not paid, by collecting the M-VAT Sales tax department acknowledge that purchases are genuine:	Balaji Textile Industries P Ltd. V/s ITO 49 ITD( 177 (Born)
4	When Quantity tallied, No	Balaji Textile Industries (P) Ltd v.

	addition can be made:	ITO (1994) 49 ITD 177 (Bom) DCIT v. Adinath Industires (2001) : 252 ITR 476 (Guj) CIT v. M K Brothers (1987) : 163 ITR 249 (Guj) DCIT v. Adinath Industries (2001) : 247 ITR 35 DY.CIT V. BRAHMAPUTRA STEELS (P) LTD. [2002] 122 TAXMAN 32 (ITAT GAUHATI)-
5	Purchase party not found but the sales against the purchase is accepted. Then the addition cannot be made:-	Rajesh P Soni V/s ACIT 100 ITJ 892 (Ahd) CIT V/s Nikunj Eximp Enterprises (P.) Ltd. * [2013] 35 taxmann.com 384 (Bombay HC)
6	Addition cannot be made without evidence:	ITO V / s Permanand [2008 25 SOT 11] CIT V /s M K Bros. [163 ITR 249] CIT V. Kashiram Textile Mills P Ltd. [2006] 284 ITR 61 (GUJ) Saraswathi Oil Traders V. CIT [2000] 254 ITR 259 (SC)174 CTR 108 (SC)
7	AO relied on third party information without cross-examination. Hence, can't be relied:	Kishan Chand Chella Ram v. CIT [1980] 125 ITR 713 (SC) Marneedi Satyam V/s Masimukkula Venkataswami [AIR 1949 Mad 689] ITO V/s Permanand [2008 25 SOT 11]
8	AO failed to discharge his duty to prove the transaction as bogus:	ITO V/s Permanand [2008 25 SOT 11] DCIT v. Shri Rajeev G. Kalathil, (Mum) (Trib) (ITA No. 6727/M/2012 dt.20/8/2014.
9	Payments were made by account payee cheques. This fact would over shadow all other short coming.	Mather & Platt (India) Ltd. vs CIT 168 ITR 493 Cal ITO V / s Kashmir Ind. Palace 99 Taxmann (Chd) (Mag) RamanandSagar V/s DCIT 256 ITR 134 (Bom) CIT-I v. Nangalia Fabrics (P.) Ltd. [2013] 40 taxmann.com 206(Gujarat) CIT V. Korlay Trading Co. Ltd. [1998] 232 ITR 820 (CAL) CIT V /s Basant Investment Corporation (1999) 238 ITR 680

		(Cal).
10	Transaction duly supported by the evidence, no evidence that cash received back. Addition cannot be made:	CIT V/s M K Bros. [163 ITR 249] ITO V/s Kanchanwala Gems 122 TTJ 854
11	No Defects in books of account found by the AO. Hence, the addition cannot be made on mere statement basis:	R K Synthetics V/s ITO 81 TTJ 909
12	Identity, Source of payment explained, Bank payment, Books of account accepted, Then addition of book entries cannot be take place:	Babulal C Borana V /s ITO [282 ITR 251]
13	Issue is also decided by the Hon'ble Jurisdictional Tribunal in case of Ganpatraj Sanghi :	Shri Ganpatraj A Sanghavi V/s ACIT I.T.A. No.2826/Mum/2013
14	WITHOUT PREJUDICE TO ABOVE: Credit of Bogus purchase will be allowed if the same is sold or lying in stock:	Free India Assurance Services Ltd. V/s DCIT [2011] 12 taxmann.com 424 (Mum)
15	Bogus purchases: Fact that list of hawala dealers of the sales- tax dept and that assessee is unable to produce them does not mean that the purchases are bogus if the payment is through banking channels & GP ratio become abnormally high.	Asstt. CIT V/s Shri RamilaPravin Shah suppliers names appear in the ITA No.5246/Mum/2013

7. On the other hand, the Id. DR for the Revenue supported the orders of authorities below. The Id. DR for the Revenue argued that the Investigation Wing of the Income-tax Department made full-fledged enquiry. The parties from whom the assessee has shown the purchases are bogus Hawala dealers. The hawala dealers are indulged in issuing bogus bills without delivery of any material or goods. The assessee obtained accommodation bills only in

order to inflate the expenses and to bring down the profitability in order to avoid the tax. The Id. DR for the Revenue prayed for dismissal of the appeal.

8. We have considered the rival submission of the parties and have gone through the orders of authorities below. The Assessing Officer while making re-opening noted that assessee is one of the person who has obtained bogus bill of Rs. 35,34,415/- during the year under consideration. During the re-assessment proceeding, the assessee furnished details of purchases made from 12 parties. The assessee has shown the purchases of Rs.2,91,36,808/-. The assessee was asked to show cause as to why the amount of Rs. 2,91,36,808/- be disallowed for the want of verification. The assessee submits the copy of bills, ledger and bank statement. The Assessing Officer examined the details furnished by assessee and observed that the purchased quantity of material is shown in the corresponding sale. The assessee could not prove the genuineness of bill. The Assessing Officer further recorded that assessee failed to produce the parties, receipt of material is not in doubt. However, the source of material received by assessee is in doubt. On the basis of his observation, the Assessing Officer concluded that the assessee has inflated the purchases by booking the above purchased bill and on the basis of decision of Hon'ble Gujarat High Court in case of Bholanath Poly Fab P. Ltd. Vs ITO, the Assessing Officer disallowed 12.5% of the alleged bogus purchases. Being aggrieved, the assessee filed appeal before the Id. CIT(A), the Id. CIT(A) upheld the validity of the re-opening, however, while

considering the merit of the addition/disallowance made by Assessing Officer on account of bogus purchases. The Id. CIT(A) observed that ledger account and the bank account, statement maintained by the assessee at BMC Bank does not match with the name of the parties mentioned in the statement of bank account. Further, prior to the payment made there has been deposit of cash in the bank, the veracity and authenticity of which could not be proved by the assessee despite offering opportunity, therefore, a notice of enhancement dated 23.08.2017 was issued to the assessee as to why entire alleged purchases may not be considered as a bogus. The Id. CIT(A) recorded that the assessee failed to represent his case and not made the compliance of statutory notice. The Id. CIT(A) on his observation that no concrete evidence is produced by the assessee to prove the delivery of goods through independent agency of the purchases and that the cash deposit, bank account of the assessee prior to the payment. The Id. CIT(A) disallowed the entire claim of purchases. We have noted that the Assessing Officer as well as the Id. CIT(A) has not disputed the sale of the material. The observation of Id. CIT(A) that there is cash deposit in the bank of assessee. In our view, the deposit of cash is a normal routine in the course of business. Unless there is allegation or material on record to prove that money was came back to the assessee. The Transaction through banking channel cannot be discarded. The Id. CIT(A) has not bring anything on record to prove that cash was returned back to the assessee. The sales are not possible in absence of purchases. The

Id. AR of the assessee has relied on a number of decisions with regard to his contentions that suspicious cannot take place the evidence or substitutes the evidence when quality tallied no addition can be made, addition cannot be made without evidence, information of third party cannot be the basis of admission or addition cannot be without any evidence etc. In our view, in case related to the bogus purchases, the principle enunciated in various law relied by Id. AR cannot be rely in a straight jacket formula. Each and every case depends upon particular set of facts.

9. As we have already noted that while making re-opening, the Assessing Officer has noted that the assessee obtained a bogus bill of Rs.35,34,415/-. However, the addition was made to the extent of 12.50% of the alleged bogus purchases shown by assessee. The Id. CIT(A) issued the notice of enhancement on the basis of his observation that the amount paid to the dealers as mentioned in the ledger account does not match with the parties mentioned in the statement of the bank account and that there is cash deposit in the bank. The Id. CIT(A) has not specified as to which name is not match with the ledger account or that how much cash deposit was made before the payment through banking transaction. The Id. CIT(A) has not brought on record any specific information or name of the parties which is not tally with the ledger account and the bank statement. In our view, the observation of Id. CIT(A) without bringing any material on record is not sustainable. However, we are of the considered view that under the Income-tax Act only

real income can be taxed by the Revenue. Even if the transaction is not verifiable, due to any reason, the only taxable is the taxable income component and not the entire transaction. After considering the submission of the parties and peculiarity of the fact, we are of the opinion that in order to fulfill the gap of revenue leakage, the disallowance of reasonable percentage of the alleged bogus purchases would meet the end of justice. Considering the totality of the fact on account of bogus purchases is restricted to 12.5% of alleged purchases of Rs. 2,91,36,808/-. Similar view was taken by the Hon'ble Bombay High Court in case of CIT Vs. Hariram Bhambhani in ITA No. 313 of 2013 dated 04.02.2015. In view of the above discussion, the ground of appeal raised by assessee is partly allowed.

10. Ground No. 6 & 7 is consequential; Ground No.8 is general, which needs no specific adjudication.

11. In the result, appeal filed by assessee is partly allowed.

Order pronounced in the open court on 31.05.2018.

**Sd/-**  
**G.S. PANNU**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**PAWAN SINGH**  
**JUDICIAL MEMBER**

Mumbai, Date: 31.05.2018

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**Copy of the Order forwarded to :**

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|-------------------------------|----------------------|
| 1. Assessee                   | 2. Respondent        |
| 3. The concerned CIT(A)       | 4. The concerned CIT |
| 5. DR "A" Bench, ITAT, Mumbai |                      |
| 6. Guard File                 |                      |

**BY ORDER,**  
**Dy./Asst. Registrar**  
**ITAT, Mumbai**