आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,' 'एच'',मुंबई।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'H' MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**
श्री मनोज कुमार अग्रवाल, लेखा सदस्य, के समक्ष

Before Shri Joginder Singh, Judicial Member, and
Shri Manoj Kumar Aggarwal, Accountant Member

ITA Nos.2602 & 2603/Mum/2016
Assessment Year: 2010-11 & 2011-12

Smt. Kiran Navin Doshi D-705, Kalp Nagri B.R. Road, Mulund (W) Mumbai 400080	**बनाम**/ Vs.	Income Tax Officer-23(2)(4) C-10, Pratyksha Kar Bhavan BKC, Bandra East Mumbai
(राजस्व /Revenue)		(निर्धारिती /Assessee)
		PAN. No. ABWPD5848A

राजस्व **की ओर से** / Revenue by	Shri Rajat Mittal-DR
निर्धारिती **की ओर से /** Assessee by	None

सुनवाई की तारीख **/ Date of Hearing:**	**20/06/2018**
आदेश की तारीख /**Date of Order:**	**20/06/2018**

आदेश / O R D E R

Per Joginder Singh(Judicial Member)

These two appeals are by the assessee against the impugned orders both dated 10/02/2016 of the Ld. First Appellate Authority, Mumbai, restricting the addition @ 12.5% of alleged bogus purchases of Rs.57,22,225/- (Assessment Year 2010-11) and Rs.55,45,395/- for Assessment Year 2011-12.

2. During hearing, none was present for the assessee, in spite of the fact that on 08/02/2018, the appeals were adjourned at the request of the assessee. On 19/06/2018 again none was present for the assessee and the appeals were adjourned to 20/06/2018. On that date also, nobody represented the assessee. Shri Rajat Mittal, Ld. DR strongly defended the addition made by the Ld. Assessing Officer by further arguing that CIT(A) has already taken a lenient view rather it should be increased at least at 25%.

2.1. We have considered the submissions of Ld. DR and perused the material available on record. Before adverting further, we deem it appropriate to consider various decisions from Hon'ble Apex Court /Hon'ble High Courts, so that we can reach to a fair conclusion. The Hon'ble Gujarat High

Court in Sanjay Oilcakes Industries vs. CIT (2009) 316 ITR 274 (Guj.) held as under:-

> "11. Having heard the learned advocates appearing for the respective parties, it is apparent that no interference is called for in the impugned order of the Tribunal dated April 29, 1994, read with the order dated September 29, 1994, made in miscellaneous application. In the principal order the Tribunal has recorded the following findings:-
>
> > *"8.3. We have considered the rival submissions and perused the facts on record. In our opinion, the action of the Commissioner of Income-tax (Appeals) confirming 25 per cent. of the amounts claimed is fair and reasonable and no interference is called for. The Commis sioner of Income-tax (Appeals) has gone through the purchase prices of the raw material prevalent at the time and rightly came to the con clusion that the disallowance to the extent of 25 per cent. was called for. It is established that the parties were not traceable ; they opened the bank accounts in which the cheques were credited but soon thereafter the amounts were withdrawn by bearer cheques. That fairly leads to the conclusion that these parties were perhaps creation of the assessee itself for the purpose of banking purchases into books of account because the purchases with bills were not feasible. Thus, the abovenoted parties become conduit pipes between the assessee-firm and the sellers of the raw materials. Under the circumstances, it was not impossible for the assessee to inflate the prices of raw materials. Accordingly, an addition at the rate of 25 per cent. for extra price paid by the assessee than over and above the prevalent price is fair and reasonable and we accordingly confirm the finding of the Commis sioner of Income-tax (Appeals)."*

> 12. Thus, it is apparent that both the Commissioner (Appeals) and the Tribunal have concurrently accepted the finding of the Assessing Officer that the apparent sellers who had issued sale bills were not traceable. That goods were received from the parties other than the persons who had issued bills for such goods. Though the purchases are shown to have been made by making payment thereof by account payee cheques, the cheques have been deposited in bank accounts ostensibly in the name of the apparent sellers, thereafter the entire amounts have been withdrawn by bearer cheques and there is no trace or identity of the person withdrawing the amount from the bank accounts. In the light of the aforesaid nature of evidence it is not possible to record a different conclusion, different from the one recorded by the Commissioner (Appeals) and the Tribunal concurrently holding that the apparent sellers were not genuine, or were acting as conduit between the assessee-firm and the actual sellers of the raw materials. Both the Commissioner (Appeals) and the Tribunal have, therefore, come to the conclusion that in such circumstances, the likelihood of the purchase price being inflated cannot be ruled out and there is no material to dislodge such finding. The issue is not whether the purchase price reflected in the books of account matches the purchase price stated to have been paid to other persons. The issue is whether the purchase price paid by the assessee is reflected as receipts by the recipients. The assessee has, by set of evidence available on record, made it possible for the recipients not being traceable for the purpose of inquiry as to whether the payments made by the assessee have been actually received by the apparent sellers. Hence, the estimate made by the two appellate authorities does not warrant interference. Even otherwise, whether the estimate should be at a particular sum or at a different sum, can never be an issue of law."

In the aforesaid case, the Hon'ble High Court accepted that the apparent sellers, who issued the said bills were not traceable and the goods received from parties other than the

persons, who had issued the bills for such goods. The purchases were shown to have been made by making payments, through banking channel and thus the apparent sellers were not genuine or were acting as conduit between the assessee and the actual seller. In such a situation, the conclusion drawn by the Ld. Commissioner of Income Tax (Appeal) as well as by the Tribunal was affirmed. Hon'ble Apex Court in Kachwala Gems vs JCIT (2007) 158 taxman 71 observed that an element of guesswork is inevitable in cases, where estimation of income is warranted.

2.2 The Hon'ble Gujarat High Court in CIT vs Bholanath Poly Fab. Pvt. Ltd. (2013) 355 ITR 290 (Guj.) held/observed as under:-

> *"5. Having come to such a conclusion, however, the Tribunal was of the opinion that the purchases may have been made from bogus parties, nevertheless, the purchases themselves were not bogus. The Tribunal adverted to the facts and data on record and came to the conclusion that the entire quantity of opening stock, purchases and the quantity manufactured during the year under consideration were sold by the assessee. Therefore, the purchases of the entire 1,02,514 metres of cloth were sold during the year under consideration. The Tribunal, therefore, accepted the assessee's contention that the finished goods were purchased by the assessee, may be not from the parties shown in the accounts, but from other sources. In that view of the matter, the*

Tribunal was of the opinion that not the entire amount, but the profit margin embedded in such amount would be subjected to tax. The Tribunal relied on its earlier decision in the case of Sanket Steel Traders and also made reference to the Tribunal's decision in the case of Vijay Proteins Ltd. v. Asst. CIT [1996] 58 ITD 428 (Ahd).

6. We are of the opinion that the Tribunal committed no error. Whether the purchases themselves were bogus or whether the parties from whom such purchases were allegedly made were bogus is essentially a question of fact. The Tribunal having examined the evidence on record came to the conclusion that the assessee did purchase the cloth and sell the finished goods. In that view of the matter, as natural corollary, not the entire amount covered under such purchase, but the profit element embedded therein would be subject to tax. This was the view of this court in the case of Sanjay Oilcake Industries v. CIT [2009] 316 ITR 274 (Guj). Such decision is also followed by this court in a judgment dated August 16, 2011, in Tax Appeal No. 679 of 2010 in the case of CIT v. Kishor Amrutlal Patel. In the result, tax appeal is dismissed."

2.3 Likewise, the Hon'ble Gujarat High Court in CIT vs Vijay M. Mistry Construction Ltd. (2013) 355 ITR 498 (Guj.) held/observed as under:-

"6. As is apparent from the facts noted hereinabove, the Commissioner (Appeals) after appreciating the evidence on record has found that the assessee had in fact made the purchases and, hence, the Assessing Officer was not justified in disallowing the entire amount. He, however, was of the view that the assessee had inflated the purchases and, accordingly, by placing reliance on the decision of the Tribunal in the case of Vijay Proteins (supra) restricted the disallowance to 20 per cent. The

Tribunal in the impugned order has followed its earlier order in the case of Vijay Proteins to the letter and enhanced the disallowance to 25 per cent. Thus, in both cases, the decision of the Commissioner (Appeals) as well as that of the Tribunal is based on estimate. This High Court in the case of Sanjay Oil Cake [2009] 316 ITR 274 (Guj) has held that whether an estimate should be at a particular sum or at a different sum can never be a question of law.

7. The apex court in the case of Kachwala Gems [2007] 288 ITR 10 (SC) has held that in a best judgment assessment there is always a certain degree of guess work. No doubt, the authorities should try to make an honest and fair estimate of the income even in a best judgment assessment and should not act totally arbitrarily but there is necessarily some amount of guess work involved in a best judgment assessment.

8. Examining the facts of the present case in the light of the aforesaid decisions, the decision of the Tribunal, being based on an estimate, does not give rise to any question of law so as to warrant interference.

9. In so far as the proposed questions (C), (D) and (E) are concerned, the same are similar to the proposed question (A) wherein the Tribunal has restricted the addition to 25 per cent. on similar facts. In the circumstances, for the reasons stated hereinabove, the said grounds of appeal do not give rise to any question of law.

10. As regards the proposed question (B) which pertains to the deletion of addition of Rs. 7,88,590 made on account of inflation of expenses paid to Metal and Machine Trading Co. (MMTC), the Assessing Officer has found that MMTC was a partnership firm of Shri Nitin Gajjar along with his father and brother operating from Bhavnagar. A perusal of their transactions with the assessee indicated that there is some inflation of expenses as detailed in paragraph 6.1 of the assessment order.

After considering the evidence on record, the Assessing Officer disallowed the amount Rs. 7,88,590 on account of payment made to MMTC.

11. The assessee preferred an appeal before the Commissioner (Appeals), who upon appreciation of the evidence on record found that the Assessing Officer had not rejected the genuineness of the purchases made from MMTC while making the disallowance. His observations were based on inflation of rates which were being charged from the assessee. According to the Commissioner (Appeals), though MMTC in some respect could be attributed to be associated with the assessee-company, still it could not be expected that MMTC was carrying out its business without any motive or profit. According to the Commissioner (Appeals), it was proved by the assessee that the rates charged by MMTC were comparable with the prevailing market rates, no such addition can stand. The Commissioner (Appeals) took note of the fact that it was not the case of the Assessing Officer that the purchases had been directly effected from third parties and not directly from MMTC ; the difference could not be the net profit in the hands of MMTC ; and that while conducting the entire exercise MMTC would have to incur certain expenditure in transportation, in engaging personnel in the office and other operations and was accordingly of the view that there was no case of actual inflation of rates and deleted the addition.

12. The Tribunal, in the impugned order, has concurred with the findings recorded by the Commissioner (Appeals) and has found that the assessee had made purchases from MMTC at the prevailing market rates and that MMTC had incurred certain expenditure in engaging personnel in the office and other operations and would make some income from the entire exercise. In the circumstances, the purchases made by the assessee from MMTC would not be hit by the provisions of section 40A(2) of the Act.

13. Thus, the conclusion arrived at by the Tribunal is based on concurrent findings of fact recorded by the Commissioner (Appeals) as well as the Tribunal. It is not the case of the Revenue that the Tribunal has taken into account any irrelevant material or that any relevant material has not been taken into consideration. In the absence of any material to the contrary being pointed out on behalf of the Revenue, the impugned order being based on concurrent findings of fact recorded by the Tribunal upon appreciation of the evidence on record, does not give rise to any question of law in so far as the present ground of appeal is concerned.

14. In relation to the proposed question (F) which relates to the deletion of addition of Rs. 44,54,426 made on account of purchase of crane and allowing depreciation on the same, the Assessing Officer observed that the assessee had purchased a crawler crane for an amount of Rs. 24,61,000 excluding the cost of spare parts of Rs. 14,98,490. The Assessing Officer after examining the evidence on record and considering the explanation given by the assessee, made addition of Rs. 44,54,426, Rs. 39,59,490 being the purchase price of the crane along with its spare parts and Rs. 4,94,936 being depreciation claimed by the assessee. The Commissioner (Appeals), upon appreciation of evidence on record, was of the view that the Assessing Officer has not appreciated the facts of the case properly and had made disallowance which was not permitted by the Income-tax Act. It was held that disallowance could only have been made in respect of expenses debited to the profit and loss account whereas in the present case the purchase of crane and spare parts of the crane and other machineries were in the nature of acquisition of capital asset. According to the Commissioner (Appeals), the disallowance could have been made on depreciation only if at all the Assessing Officer conclusively proved that the purchases of crane and other parts are bogus. Upon appreciation of the material on record the Commissioner (Appeals) found that the Assessing

Officer has simply brushed aside all the evidence on account of technical infirmities and that the evidence such as octroi receipt ; hypothecation of the crane to the bank; existence of the crane even till date with the assessee conclusively proved that the crane was purchased and it was in use even as on date with the assessee. The Commissioner (Appeals) accordingly found that there was no scope for any disallowance and accordingly deleted the disallowance made on account of purchase of crane and allowed the depreciation as claimed by the assessee.

15. The Tribunal, in the impugned order, has noted that the cost of crane was never claimed by the assessee in the return of income. Before the Tribunal, the assessee produced the evidence that the crane in question was registered with the RTO and the same was wholly and exclusively used for the purposes of its business. The Tribunal, therefore, held that the Commissioner (Appeals) was legally and factually correct in deleting the disallowance of cost of crane as well as depreciation thereon.

16. From the facts emerging from the record, it is apparent that the assessee had never claimed the cost of the crane in the return nor had it debited the expenses to the profit and loss account, and as such the question of disallowing the same and adding the same to the income would not arise. Moreover, in the absence of any evidence to indicate that the purchase was bogus or that the crane in fact did not exist, the question of disallowing the deprecation in respect of the same also would not arise. When the assessee had conclusively proved the purchase and existence of the crane, and had not debited the expenses to the profit and loss account, no addition could have been made in respect of the purchase price nor could have depreciation been disallowed in respect thereof. The Tribunal was, therefore, justified in deleting the addition as well as disallowance of depreciation.

17. In the light of the aforesaid discussion, it is not possible to state that there is any legal infirmity in the impugned order made by the Tribunal so as to warrant interference. In the absence of any question of law, much less, a substantial question of law, the appeal is dismissed."

2.4 The Hon'ble jurisdictional High Court in the case of CIT vs Ashish International Ltd. (ITA No.4299/2009) order dated 22/02/2011, observed/held as under:-

"The question raised in this appeal is, whether the Tribunal was justified in deleting the addition on account of bogus purchases allegedly made by the assessee from M/s. Thakkar Agro Industrial Chem Supplies P. Ltd. According to the revenue, the Director of M/s. Thakkar Agro Industrial Chem Supplies P. Ltd. in his statement had stated that there were no sales / purchases but the transactions were only accommodation bills not involving any transactions. The Tribunal has recorded a finding of fact that the assessee had disputed the correctness of the above 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 above statement. The appellate authority had sought remand report and even at that stage the genuineness of the statement has not been established by allowing cross examination of the person whose statement was relied upon by the revenue. In these circumstances, the decision of the Tribunal being based on the fact, no substantial question of law can be said to arise from the order of the Tribunal. The appeal is dismissed with no order as to costs."

2.5 The Hon'ble Gujarat High Court in CIT vs M.K. Brothers (163 ITR 249) held/observed as under:-

"Being aggrieved by the aforesaid order, the assessee went in second appeal before the Tribunal. It was urged on behalf of the assessee that the transactions in question were normal business transactions and the assessee had made payments by cheques. The parties did not come forward and if they did not come, the assessee should not suffer. However, on behalf of the Revenue, it was urged that detailed inquiries were made and thereafter the conclusion was reached. The Tribunal found that there was no evidence anywhere that these concerns gave bogus vouchers to the assessee. No doubt, there were certain doubtful features, but the evidence was not adequate to conclude that the purchases made by the assessee from the said parties were bogus. The Tribunal accordingly, did not sustain the addition retained by the Appellate Assistant Commissioner. Hence, at the instance of the Revenue, the aforesaid question has been referred to this court for opinion.

On a perusal of the order of the Tribunal, it clearly appears that whether the said transactions were bogus or not was a question of fact. The Tribunal has also pointed out that nothing is shown to indicate that any part of the fund given by the assessee to these parties came back to the assessee in any form. It is further observed by the Tribunal that there is no evidence anywhere that these concerns gave vouchers to the assessee. Even the two statements do not implicate the transactions with the assessee in any way. With these observations, the Tribunal ultimately has observed that there are certain doubtful features, but the evidence is not adequate to conclude that the purchases made by the assessee from these parties were bogus. It may be stated that the assessee was given credit facilities for a short duration and the payments were given by cheques. When that is so, it cannot be said that the entries for the purchases of the goods made in the books of account were bogus entries. We, therefore, do

not find that the conclusion arrived at by the Tribunal is against the weight of evidence. In that view of the matter, we answer the question in the affirmative, that is, in favour of the assessee and against the Revenue. Accordingly, the reference stands disposed of with no order as to costs."

2.6 The Mumbai Bench of the Tribunal in the case of DCIT vs Rajeev G. Kalathil (2015) 67 SOT 52 (Mum. Trib.)(URO), identically, held as under:-

"2.2.Aggrieved by the order of the AO, assessee preferred an appeal before the First Appellate Authority(FAA).Before him it was argued that assessee had filed copies of bills of purchase from DKE and NBE, that both the suppliers were registered dealers and were carrying proper VAT and registration No.s, that ledger accounts of the parties in assessee's books showed bills accounted for, that payment was made by cheques, that a certificate from the banker giving details of cheque payment to the said parties was also furnished. Copies of the consignment, received from the Government approved transport contractors showing that material purchased was actually delivered at the site was furnished before the AO. It was also argued that some of the material purchased from the said parties were lying part of closing stock as on 31.03.2009 as per the statement submitted on record. After considering the assessment order and the submissions made by the assessee, FAA held that the transactions were supported by proper documentary evidences, that the payments made to the parties by the assessee were in confirmation with bank certificate,t hat the suppliers was shown as default under the Maharashtra VAT Act could not be sufficient evidences to hold that the purchases were non-genuine, that the AO had not brought any independent and reliable evidences against the assessee to prove the non-genuineness of the purchases, that there was no evidence regarding cash received back from the

suppliers. Finally, he deleted the addition made by the AO .

"2.3.Before us, Departmental Representative argued that both the suppliers were not produced before the AO by the assessee, that one of them was declared hawala dealer by VAT department, that because of cheque payment made to the supplier transaction cannot be taken as genuine. He relied upon the order of the G Bench of Mumbai Tribunal delivered in the case of Western Extrusion Industries. (ITA/6579/Mum/2010-dated 13.11.2013). Authrorised representative (AR) contended that payments made by the assessee were supported by the banker's statement, that goods received by the assessee from the supplie was part of closing stock,that the transporter had admitted the transportation of goods to the site.He relied upon the case of Babula Borana (282 ITR251), Nikunj Eximp Enterprises (P) Ltd. (216Taxman171)delivered by the Hon'ble Bombay High Court.

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 traial. Secondly, proof of movement of goods is not in doubt. Thererfore,

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."

2.7. The Hon'ble jurisdictional High Court in CIT vs Nikunj Exim Enterprises Pvt. Ltd. (2015) 372 ITR 619 (Bom.) held/observed as under:-

"7. We have considered the submission on behalf of the Revenue. However, from the order of the Tribunal dated April 30, 2010, we find that the Tribunal has deleted the additions on account of bogus purchases not only on the basis of stock statement, i.e., reconciliation statement but also in view of the other facts. The Tribunal records that the books of account of the respondent-assessee have not been rejected. Similarly, the sales have not been doubted and it is an admitted position that substantial amount of sales have been made to the Government Department, i.e., Defence Research and Development Laboratory, Hyderabad. Further, there were confirmation letters filed by the suppliers, copies of invoices for purchases as well as copies of bank statement all of which would indicate that the purchases were in fact made. In our view, merely because the suppliers have not appeared before the Assessing Officer or the Commissioner of Income-tax (Appeals), one cannot conclude that the purchases were not made by the respondent-assessee. The Assessing Officer as well as the Commissioner of Income-tax (Appeals) have disallowed the deduction of Rs. 1.33 crores on account of purchases merely on the basis of suspicion because the sellers and the canvassing agents have not been produced before them. We find that the order of the Tribunal is well a reasoned order taking into account all the facts before concluding that the

purchases of Rs. 1.33 crores was not bogus. No fault can be found with the order dated April 30, 2010, of the Tribunal."

2.8 If the ratio laid down by Hon'ble jurisdictional High Court in the aforesaid case of M/s Nikunj Eximp. Enterprises Pvt. Ltd.((supra)) is analyzed with the facts of the present appeal, it is noted that the assessee declared income of Rs.2,63,573/- on 05/10/2010 (Assessment Year 2010-11) and Rs.2,67,678/- for Assessment Year 2011-12. Subsequently, information was received from the DGIT (Inve.) that the assessee made purchases from certain parties who are listed as Hawala traders/bogus bill providers at the website of Sales Tax Department, consequently, the assessment was reopened under section 147/148 of the Act. The notices issued under section 133(6) of the Act were returned unserved. The Ld. Assessing Officer completed the assessment by making addition of Rs.57,22,225/- (Assessment Year 2010-11) and Rs.55,45,395/-(Assessment Year 2011-12). On appeal, before the Ld. Commissioner of Income Tax (Appeal), the factual matrix along with various case laws were considered and the addition was reduced to 12.5% of the bogus purchases. We have perused the reasoning contained in the impugned orders along with the

cases relied thereupon. It is noted that the Ld. Commissioner of Income Tax (Appeal) has justifiably relied upon various decisions. In the case of Sumit P. Seth, it was held by the Hon'ble High Court that no uniform yardstick could be applied to estimate the rate of profit as, it varies with the business. Considering the totality of facts and the judicial pronouncements discussed hereinabove, we find no infirmity in the orders of the Ld. Commissioner of Income Tax (Appeal), resultantly; the appeals of the assessee are dismissed.

Finally, the appeals of the assessee are dismissed.

This Order was pronounced in the open court in the presence of Ld. DR at the conclusion of hearing on 20/06/2018.

Sd/-	**Sd/-**
(Manoj Kumar Aggarwal)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** /JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 20/06/2018

*Shekhar, P.S./*नि.स.

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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