<u>आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, ,मुंबई।</u>

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

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री राजेश कुमार, लेखा सदस्य**,** के समक्ष

Before Shri Joginder Singh, Judicial Member, and Shri Rajesh Kumar, Accountant Member

ITA No.499/Mum/2018
Assessment Year: 2011-12

M/s Pushpak Auxichem Pvt. Ltd. 241/Business-2, Kasturi Plaza, 2nd Floor, Manpada Road, Dombivali (East), Thane-421201	**<u>बनाम</u>**/ Vs.	Income Tax Officer Ward-1(3), Mohan Plaza, 1st Floor, Wayle Nagar, Khadak Pada, Kalyan-421301
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN. No.AABCP0099E		

निर्धारिती **की ओर से /** Assessee by	Shri J P Purohit
राजस्व **की ओर से** / Revenue by	Shri S.K. Bepari-DR

सुनवाई की तारीख **/ Date of Hearing :**	**06/09/2018**
आदेश की तारीख /**Date of Order:**	**25/09/2018**

आदेश / O R D E R

Per Joginder Singh, JM

The assessee is aggrieved by the impugned order dated 15/09/2017 of the Ld. First Appellate Authority, Pune.

2. The only ground argued by the learned counsel for the assessee is with respect to confirming the addition of Rs. 15,69,619/- made under section. 69C of the Income Tax Act, 1961 (hereinafter the Act) with respect to bogus purchases.

3. During hearing the learned counsel for the assessee Shri J P Purohit contended that the assessee is contending in chemicals, the purchases made through account payee cheque, duly maintained in the books of account, therefore, there was no justification to disallow the same. It was pleaded that for assessment year 2009-10, the disallowance was made @12.5% whereas in A.Y. 2010-11 it was restricted to 10%. On the other hand, Shri S K Bepari, learned DR depended on the order of the learned CIT(A). The crux of the argument on behalf of the Revenue is that

the order of the learned CIT(A) may be upheld as the learned CIT(A) has taken one of the possible view.

4. We have considered the rival submissions and perused the material available on record. We note that the learned Assessing Officer got information from the Sales Tax Department that the assessee is beneficiary of bogus bills from certain parties, who are involved in issuing bogus bills. Notice under section 148 was issued to the assessee. The learned Assessing Officer in order to verify the genuineness of transaction between the assessee and three parties issued notices under section. 133(6), which were returned by the postal authorities unserved. The ward inspector was deputed, who vide letter dated 10.09.2014, reported that the claimed parties are not in existence at their addresses and their whereabouts is not known. Thereafter a show cause letter dated 22.10.2014 along with notice under section. 142(1) was issued to the assessee with a request to produce the parties and also to furnish the necessary documents. The assessee neither produced the parties nor submitted the details. Finally, the learned Assessing Officer treated the claimed purchases as bogus

and added to the total income of the assessee. On appeal before the learned CIT(A), the addition so made was affirmed. The assessee is in appeal before this Tribunal.

5. Before adverting further, we deem it appropriate to consider various decisions from Hon'ble High Courts/Hon'ble Apex Court, so that we can reach to a proper 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 :
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> > *"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."

5.1 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.

5.2. 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."

5.3. 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."

5.4. 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."

5.5. 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."

5.6. 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."

5.7. The ratio laid down in the case of M/s Neeta Textiles vs Income Tax Officer 6138/Mum/2013, order dated 27/05/2013, Shri Jigar V. Shah vs Income Tax Officer (ITA No.1223/M/2014) order dated 22/01/2016, M/s Imperial Imp. & Exp. vs Income Tax Officer ITA No.5427/Mum/2015, order dated 18/03/2016 supports the case of the assessee and the conclusion drawn in the impugned order. However, as relied by the Ld. DR, the Hon'ble Gujarat High Court in the case of N.K. Industries Ltd.,etc vs DCIT (supra) considering various decisions decided the issue in favour of the Revenue and the Hon'ble

Apex Court dismissed the SLP vide order dated 16/01/2017 (SLP No.(c) 769 of 2017). We find that in that case, during search proceedings, certain blank signed cheque books and vouchers were found and thus the purchases made from these concerns, were treated as bogus by the Assessing Officer.

5.8. The Hon'ble Gujarat High Court in N.K. Industries Ltd. vs DCIT (IT Appeal No.240, 261, 242, 260 and 241 of 2003), vide order dated 20/06/2016 considered the decision of the Tribunal and various judicial decisions including the case of Vijay Proteins and Sanjay Oilcakes Industries ltd., M/s Woolen Carpet Factory vs ITAT (2002) 178 CTR 420 (Raj.), the Tribunal was held to be justified in deciding the case against the assessee. The Hon'ble Apex Court confirmed the decision of the High Court for adding the entire income on account of bogus purchases (SLP (C) Nos. 769 of 2017, order dated 16/01/2017.

5.9. In such type of cases, broadly, the Ld. Commissioner of Income Tax (Appeal) as well as this Tribunal has followed the decisions from Hon'ble Gujarat High Court in the case of Simit P. Seth (2013) 356 ITR 451

(Guj.), CIT vs Vijay M. Mistry Construction Ltd. (2013) 355 ITR 498 (Guj.), CIT vs Bhola Nath Poly Fab. (P.) Ltd. (2013) 355 ITR 290 (Guj.) and various other decisions of the Tribunal and the decision of M/s Nikunj Eximp(supra) from Hon'ble jurisdictional High Court, wherein, the aggregate disallowance was restricted to 12.5%. Admittedly, there cannot be sale without purchases. The case of the Revenue is that there is bogus nature of purchases made from suppliers and the parties were not found existing at the given addresses.

5.10. The Ahmedabad Bench of the Tribunal in the case of N K Proteins Ltd. vs. DCIT (2004) 83 TTJ Ahd 904 made an elaborate discussion with respect to the issue on bogus purchases, the relevant portion from the order is reproduced here under:

> *"49. We will now deal with the main ground raised by the assessee in relation to addition of Rs. 11.99 crores made in respect of bogus purchases. We have carefully considered the elaborate arguments made by the learned representatives of both sides. We have also carefully gone through the orders of the learned Departmental authorities as well as all other documents submitted in the various paper books submitted by the learned representatives of both sides, to which our attention was drawn during the course of hearing. We have also*

carefully gone through all the judgments cited by the learned representatives.

50. One of the main arguments advanced on behalf of the assessee was that the purchases made from five suppliers in question were duly recorded in the regular books of accounts in the normal course. The IT return for asst. yr. 1998-99 had been submitted on 30th Nov., 1998 i.e. before the date of search on 24th Feb., 1999 on the basis of such regular books of accounts which include all the transactions of purchases made from them. Likewise the transactions of purchases made from these parties were recorded in the regular books of accounts till the date of search in the normal manner. Therefore, the question relating to addition in respect of purchases made from these suppliers does not come within the ambit of block assessment. Heavy reliance was placed on the judgment of the Hon'ble Gujarat High Court in the case of CIT v. N.R. Paper & Boards Ltd. (supra) and other such decisions.

51. Before we go through the ratio of judgment of the Hon'ble Gujarat High Court in the case of NR Paper & Boards Ltd. (supra), it would be relevant here to refer to the decision of the Hon'ble Supreme Court in the case of CIT v. Sun Engineering Works (P) Ltd. (1992) 198 ITR 297 (SC). The Hon'ble Supreme Court has observed as under at p. 320 of 198 ITR;

"Such an interpretation would be reading that judgment totally out of context in which the questions arose for decision in that case. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this 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 this Court. A decision of this 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, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions

under consideration by this Court, to support their reasonings. In Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India(1971) 3 SCR 9 : AIR 1971 SC 530, this Court cautioned (at p. 578 of AIR 1971 SC):

'It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment'."

52. A useful reference may be made to the judgment of the Hon'ble Gujarat High Court in the case of Gujarat State Co-operative Bank Ltd. v. CIT (2001) 250 ITR 229 (Guj). At p. 265, the Hon'ble High Court has observed as under:

"As per the settled legal position, a decision is an authority for what it actually decides and not necessarily for what logically follows from it. Equally well settled is the principle that a decision to be law under Article 141 must not be a mere conclusion by which the case is disposed of. Because, a conclusion, a mere conclusion, may be on facts, it may not and does not necessarily involve consideration of law. It is well settled that An. 141 will not be attracted if law is not declared or stated vocally to support the conclusion reached for deciding the lis. A mute declaration of the mere conclusion is not contemplated under Article 141. (vide Manager, Panjarapole, Deodar v. C.M. Nat (1997) 2 GLR 1321, 1325)."

53. Let us now refer to the decision of the Hon'ble Gujarat High Court in the case of N.R. Paper & Boards Ltd. (supra) keeping in view the principles laid down in the aforesaid judgments of the Hon'ble apex Court and the Hon'ble Gujarat High Court. The Hon'ble Gujarat High Court in the case of N.R. Paper Boards Ltd. (supra) was dealing with the reference application under Section 256(2) submitted by the CIT. It has been observed in the said judgment at pp. 529 and 530 as under:

"Earlier the assessee invoked the writ jurisdiction of this Court seeking to challenge the notices issued to them under Section 143(2) of the Act by which the assessees were required to attend the office of the Revenue in connection with the return of income submitted by them for the asst. yr. 1995-96. The assessee pointed out that the

search and seizure operation carried out on 1st Dec., 1995, was concluded on 6th Jan., 1996. Their block assessment under Chapter XIV-B of the Act was made for the block period from 1st April, 1985 to 6th Jan., 1996. In accordance with the provisions of Section 158BB of the Act, the total income was worked out after giving credit for the amount disclosed. The assessee pointed out that the income for the asst. yr. 1995-96 was already computed in the assessment for the block period. Hence, there was no question of proceeding with the regular assessment for the asst. yr. 1995-96. It was further submitted that in any event no addition could be made to the total income disclosed in the said returns in view of the block assessment made for the period which included the said asst. yr. 1995-96. The Division Bench of this Court in the case of N.R. Paper & Boards Ltd. v. Dy. CIT (1998) 234 ITR 733 (Guj) considered the provisions in detail. The Court pointed out that the block assessment of undisclosed income to be charged at a higher rate of tax prescribed was independent of the pending regular assessments and it operated in a different field from the assessment of undisclosed income which was not and would not have been disclosed for the purpose of the Act. Undisclosed income, by Chapter XIV-B, is classified separately for the purposes of assessment and is required to be worked out in the manner prescribed therein and treated to a higher rate of tax. This process did not disturb the assessments already made, of the previous years, and was only intended to sniff out what had remained hidden and not disclosed by the assessee. There would, therefore, be no overlapping in the nature of the assessment made under this chapter of undisclosed income and the regular assessment made under Section 143(3). The powers of regular assessment are kept intact and so are all the appellate, revisional and other powers affecting such regular assessment and all the statutory consequences flowing from the exercise of such powers would follow along side of this special assessment procedure devised for dealing with undisclosed income as a result of search. It, therefore, follows that the inquiry under Section 143(3) for regular assessment which was pending when the block assessment was made, the AO who comes across evidence and material which was not found or made available in the process of block assessment, cannot ignore the same and he will be duty-bound to make the regular assessment

taking into account such evidence and material gathered in the enquiry under Section 143(3) to ensure that proper assessment of total income is made and tax is determined on the basis of such assessment."

54. The Hon'ble High Court in this judgment while declining to call for reference of various questions proposed in the said reference application, relied upon its judgment in the case of N.R. Paper & Boards Ltd. (supra). It may also be relevant here to reproduce the relevant extracts from the said judgment appearing at pp. 741 and 742 :

"The definition of "undisclosed income" in Section 158B(b) includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transaction, where such asset, entry or other document or transaction representing wholly or partly income or property which has not been or would not have been disclosed for the purposes of the Act. It, therefore, follows that what the assessee had already disclosed or would have disclosed is not to be treated as undisclosed income.

From the provisions of Section 158BA(1), it would appear that the AO can proceed to assess the undisclosed income only if a search is initiated under Section 132 of the Act by the authorised officer. The total undisclosed income relating to the block period is to be charged to tax at the higher rate of 60 per cent presently specified in Section 113 of the Act after such undisclosed income is assessed in accordance with the provisions of this chapter by the AO as income of the "block period" as defined in Section 158B(a) of the Act. This has to be done "irrespective of the previous year or years to which such income relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not" as provided in Sub-section (2) of Section 158BA. This expression clearly indicates that the block assessment of undisclosed income and its being charged to a higher rate of tax prescribed, was independent of the pending regular assessments and it operated in a different field from the assessment of undisclosed income which was not and would not have been disclosed for the purposes of the Act. Undisclosed income, by this chapter,

is classified separately for the purposes of assessment and is required to be worked out in the manner prescribed therein and treated to a higher rate of tax. This process did not disturb the assessments already made, of the previous years, and was only intended to sniff out what had remained hidden and would not have been disclosed by the assessee. There would, therefore, be no overlapping in the nature of the assessment made under chapter of undisclosed income and the regular assessment made under Section 143(3) of the Act.

If the pending regular assessment proceedings were to be frozen and got substituted by the assessment of the undisclosed income of the block period, the legislature would have been specific on that aspect and would have made it clear that the pending regular assessment proceedings should be dropped. The provisions of this chapter do not either expressly or by necessary implication even remotely indicate that the regular assessment proceedings of a previous year covered in the block period, were required to be stayed or dropped or substituted by the proceedings of this chapter.

Under Sub-section (3) of Section 158BA, where the date of filing the return of income under Section 139(1) for any previous year has not expired, and the income of that previous year or the transactions relating to such income are duly recorded, then such income is not required to be included in the block period. This obviously means that the regular assessment of that previous year which has remained pending, will proceed notwithstanding that it was falling in the block period. The same would be the case where the block period includes only a part of the previous year of which the return is filed for regular assessment, and the regular assessment can proceed notwithstanding that the undisclosed income for a part of that previous year was within the block period."

55. It is apparent from a plain reading of the aforesaid decisions of the Hon'ble Gujarat High Court in the case of N.R. Paper & Boards Ltd. (supra) that the issue decided is as to whether after making of block assessment, regular assessment is barred or prohibited by law. The Hon'ble High Court has held that there would be no overlapping in the nature of assessment made under this chapter of

undisclosed income and the regular assessment made under Section 143(3). The powers of regular assessment are kept intact. All the provisions affecting such regular assessments and all the statutory consequences flowing from exercise of such powers would follow along with this special assessment procedure devised for dealing with undisclosed income as a result of search.

56. The legislature thought it fit to insert an Explanation to Section 158BA by the Finance (No. 2) Act, 1998 with retrospective effect from 1st July, 1995 to explain and declare that the assessment made under Chapter XIV-B of the Act shall be in addition to the regular assessment in respect of each previous year included in the block period, and the total undisclosed income relating to the block period shall not include the income assessed in any regular assessment as income of such block period. It further provides that the income assessed in this chapter shall not be included in the regular assessment of any previous year included in the block period. The mere fact that the AO is empowered to assess the concealed income in regular assessment does not lead to the conclusion that what the ITO can assess in regular assessment cannot be assessed in block assessment. The Hon'ble Gujarat High Court while dealing with the reference application under Section 256(2) has declined to refer the various questions suggested by the CIT mainly on the ground that the questions proposed by the Revenue did not raise any question of law and it has also been observed that where the assessee has disclosed the particulars of income or expenditure in the return/books of accounts, the AO cannot take a different view on the basis of "same material". Such observations have been made by following the judgment reported in (1998) 234 ITR 733 (Guj) (supra). The judgment of the Hon'ble Gujarat High Court in the case of N.R. Paper & Boards Ltd., if read in the context of questions raised before the Court, cannot be read as having held that even if the material found during the course of search exposes the falsity of the entries made in the regular books of accounts, the consequent concealed income cannot be assessed as undisclosed income in block assessment under Chapter XIV-B. In the present case the addition in respect of purchases made from the alleged bogus suppliers has originated on the basis of material found and seized during the search. Certain blank bill

books, signed cheque books and other documents of various parties including these five supplier concerns were found and seized from the office premises of the assessee during the search. The post-search investigation clearly indicates that these five parties did not in fact supply any material to the assessee but they were only issuing fictitious bills. They may be called "billing agents" or "name lenders". Whether they acted as billing agents/name lenders for and on behalf of the assessee as well as for and on behalf of various other parties, is a different question but ample material has been brought on record to adequately prove that these five parties from whom the assessee claimed to have made purchases of wash cotton seed oil were not the real suppliers of such material but they were only issuing fictitious bills. The falsity of the claim for purchases shown as purchases made from these billing agents/name lenders resulting in addition on account of either bogus purchases or inflated purchases will surely come within the ambit of undisclosed income as defined in Section 158B(b) as amended by the Finance Act, 2002 with retrospective effect from 1st July, 1995. The said provision is reproduced below:

"158B--In this Chapter, unless the context otherwise requires,--

(a).....:....

(b) "undisclosed income" includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act or any expense, deduction or allowance claimed under this Act which is found to be false."

It may also be relevant here to reproduce Section 158BB(1):

"158BB(1).--The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed in

accordance with the provisions of this Act, on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the AO and relatable to such evidence, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years, determined....."

57. A plain reading of Section 158B(b) clearly indicates that any expense, deduction or allowance claimed under this chapter which is found to be false as a result of search will come within the ambit of undisclosed income under Chapter XIV-B. The expressions "on the basis of evidence found as a result of search" or "other documents and such other materials of information as are available with the AO and relatable to such evidence, the undisclosed income so detected as a result of search and/or as a result of other material or information as are available with the AO, will be assessable as undisclosed income in assessment for the block period. It may be relevant here to mention that such other material or information as are available with the AO used in Section 158BB(1) would include material, information and evidence gathered as a result of post-search investigation on the basis of evidence found during the search or found as a result of search. Such information as would be available with the AO can be made the base for computation of undisclosed income of the block period. The term, the AO used in Section 158BB(1), is distinct from authorised officers who conducted the search. It, therefore, clearly indicates that the post-search investigation made by the Dy. DIT/Addl. DIT and by the AO in furtherance to the evidence found during the search can be validly taken into consideration, if such material available with the AO exposes the falsity of the entries recorded in the regular books of accounts in normal course.

58. It may also be relevant here to add that the regular assessments for asst. yrs. 1998-99 and 1999-2000 have already been completed by the AO vide orders dt. 28th March, 2001 and 27th March, 2002. The AO has not made any addition in respect of such bogus bills obtained by the assessee from these billing agents/name lenders. The addition of only Rs. 1,18,13,717 has been made in respect of

alleged unaccounted payments to Krishna Industries and Vimal Industries, which perhaps represent payments deposited in the bank accounts of these two billing agents name lenders after the date of search. It is not known what has been decided in further appeal, if any, made before the CIT(A) for asst. yr. 1999-2000. This clearly shows that the assessee as well as the AO both had understood the relevant provisions in the same manner, namely, that the addition, if any, is required to be made in respect of alleged bogus purchases or inflated purchases made from these five suppliers, it is to be made in the block assessment and not necessarily in the regular assessment. If this point is not considered in block assessment, it will escape tax altogether, as regular assessments have already been made, in which no such additions have been made. In view of the aforesaid facts and discussions, we are of the view that the question relating to addition of purchases made, from these bogus suppliers or addition in respect of inflated purchase price shown as paid to these bogus suppliers comes within the ambit of block assessment under Chapter XIV-B.

59. The other main argument advanced by the learned counsel was that the impugned assessment made by the AO for the block period is solely based on enquiries made by the Addl. DIT/Dy. DIT and on the appraisal report sent by them. All the affidavits/statements on which the AO has placed reliance were obtained by the investigation wing. The AO has simply relied on the appraisal report. The learned counsel has vehemently argued that the Addl. DIT/Dy. DIT have no power to conduct enquiry after the search. The CIT(A) has placed reliance on the judgment of the Hon'ble Gujarat High Court in the case of Arti Gases v. Dy. DIT (supra). The Hon'ble Gujarat High Court in that case at p. 63 has observed as under:

"We are of the view that the notices under Section 131(1A) can also be issued after completion of the search undertaken under the provisions of Section 132 of the Act. In our opinion, it would be absolutely logical to call for information so as to have better particulars or to have a complete idea about the material seized during the search. If some material is seized at the time of the search and the authorised officer wants to have some details so as to understand the nature of the documents, he may issue

notice under Section 131(1A) of the Act. In our opinion, in a given case such a notice cannot only help the Department but can also help the assessee. If the assessee is in a position to give more explanation so as to satisfy the authorised officer that the documents seized by him do not reveal any undisclosed income, but the income or transactions referred to in the documents had been duly shown by him in his books of account or if the assessee gives any information to the effect that the first impression of the authorised officer with regard to the nature of the documents was not correct, we are sure that such a notice would help the assessee himself. If the assessee is called upon to give some information or to explain certain documents or writings seized during the process of search, in our opinion, no harm can be caused to the assessee and as stated hereinabove, such particulars can be helpful not only to the Department but to the assessee also. We, therefore, do not agree with the submissions made by the learned advocate, Shri Puj, that such a notice can be issued only before intimation of proceedings under Section 132of the Act. Moreover, even under the provisions of Section 133 of the Act, the AO or the officers referred to in the said section are having power to call for information. So issuance of such a notice during or after the search cannot be said to be bad in law."

60. Reliance placed by the learned counsel on the judgments of the Hon'ble Supreme Court in the cases of CIT v. Plantation Corporation of Kerala (supra) and Andhra Pradesh Chambers v. State of AP and Ors. (2001) 247 ITR 36 (SC) holding that resort to any interpretative process to unfold legislative intent in a case where statutory language is clear, is impermissible, is misplaced, as the judgment of the Hon'ble Gujarat High Court in the case of Arti Gases (supra) is a direct decision involving interpretation of the relevant provisions contained in the IT Act, 1961. Furthermore, there is no merit in the aforesaid submissions of the 4earned counsel as the AO has provided adequate and reasonable opportunity to the assessee in respect of all such material, affidavits, statements obtained by the Dy. DIT/Addl. DIT in the course of assessment proceedings for the block period. A perusal of the assessment order at p. 2 shows that the AO gave complete details about such inquiries,

affidavits/statements along with the letter dt. 4th Dec., 2000. Thereafter, the AO gave several opportunities to the assessee in respect of all such material gathered by the Addl. DIT/Dy. DIT before using the same against the assessee in the assessment order. The AO has thus fully complied with the relevant provisions of law and the principles of natural justice before using the material against the assessee. This contention of the learned counsel also, therefore, has no merit.

61. We have carefully gone through all the decisions cited by the learned representatives of the parties. It is well settled law that each case will depend on the facts and circumstances of that case. The decision in every case has to be arrived at on the basis of appreciation of facts, material and evidence existing on records. However, such evidence existing on records should be appreciated and evaluated on the basis of principles of law emerging from various decisions cited by the learned representatives. We have also indicated hereinbefore as to how the facts of various cases relied upon by the learned counsel are different and distinguishable from the facts of the present case. We will however bear in mind the various principles laid down by the Hon'ble Courts while considering the facts and material relating to the present case.

62. The most important principle of law emerging from the various decisions cited by the learned counsel is that the burden of establishing that these five suppliers were bogus suppliers or that they were benamis of the assessee, lies on the Department. Such serious nature of allegation demands a credible proof of a high order to support such allegations. The burden of establishing mala fides therefore clearly lies on the Revenue. Equally well settled principle of law emerging from the various decisions cited by the learned representatives of both sides, is that the onus lies on the assessee to prove the genuineness of any expenditure, which is claimed as deduction in computing its taxable income. Therefore, the onus in the instant case, squarely lies on the assessee to prove the genuineness of purchases of cotton seed oil said to have been purchased from these five parties, which have been held to be bogus parties by the Departmental authorities. It is incumbent on the assessee to prove that the suppliers were genuine suppliers of cotton seed oil and they really supplied the

raw material to the assessee. Such a burden had to be discharged by the assessee with very strong, cogent and clinching evidence in view of blatant denial by all the five parties coupled with the various other circumstantial evidence referred to in the assessment order.

63. Let us examine the facts relating to these five parties from whom the assessee claimed to have made purchases of wash cotton seed oil aggregating to Rs. 11.99 crores. The detailed facts stated by the AO in the assessment order in relation to all these five parties viz. Adinath Corporation, Tirupati Corporation, M/s Krishna Industries, M/s Karnavati Industries and M/s Vimal Industries, clearly indicate the following facts and features:

(A) Certain blank bill books, blank signed cheque books, letter heads and vouchers of these concerns were found from the business premises of the assessee during the course of search conducted on 24th Feb., 1999.

(B)(i) There are various similar features in relation to bank accounts of all these suppliers. For instance, the bank account of Adinath Corporation was opened on 17th April, 1998 by depositing Rs. 1,000 in cash on that date during the block period from 17th April, 1998 to 7th July, 1998. The total deposits in their bank account was Rs. 2,10,54,076.50. Whenever any cheque given by the assessee towards payment of purchase price to this party was credited in their bank account, on that very day, on most of the occasions, an equivalent amount had been withdrawn by a self cheque. For instance, cheque of Rs. 3,69,857 was credited in their bank account on 23rd April, 1998 and there is a cash withdrawal of an equivalent amount on that very day. Most of the times, there is a withdrawal of an equivalent amount by self cheque on the date of deposit of the cheque on their account. This bank account was introduced by Shri Nileshbhai K. Patel, as director of the appellant-company. The balance in this bank account after such withdrawal soon after the deposit of the cheque mostly remained at the same figure of Rs. 5041. The learned Departmental Representative has submitted a copy of letter dt. 20th March, 2001 from Mehsana Urban Co-op. Bank Ltd. stating that as per the statement of account of Adinath Corporation account No.

531, all credit entries by transfer during the period from 17th April, 1998 to 7th July, 1998 are from NKPL. It clearly shows that so far in bank account of Adinath Corporation is concerned, the entire cheques deposited in this bank account were given by the appellant-company towards payments of purchase bills obtained from them. The corresponding debits in the bank account in the normal course should have been given by way of cheques to those mills from whom M/s Adinath Corporation purchased the wash cotton seed oil and supplied the same to the assessee. However, we do not find any mention in this bank account showing any cheque issued to any party. All the withdrawals are by way of self cash cheques. It is true that the bank accounts of other parties were not introduced by Shri Nileshbhai K. Patel as in the case of Adinath Corporation but there is some inter-connection of this concern with the others. M/s Tirupati Corporation is owned by the same person, namely, Shri J.J. Doshi. For example, the following three cheques have been debited in the account of M/s Adinath Corporation as per the copy placed at p. 37 of the paper book dt. 21st Oct., 2002 submitted by the Department:

Date	Cheque No.	Amount
15-4-1998	942352	2,59,429
15-4-1998	942358	2,82,945
17-4-1998	942369	3,97,792

These amounts have been credited in the bank account of M/s Tirupati Corporation with Visnagar Nagrik Sahakari Bank Ltd. A copy of account of Tirupati Corporation in the books of the assessee has also been placed at p. 42 to 45 of the said paper book, which shows that the purchase bills were obtained from Tirupati Corporation only upto 13th Feb., 1998. Thereafter, that account was discontinued and purchase bills were obtained from Adinath Corporation from 8th April, 1998 to 7th July, 1998. Likewise, cheque No. 79489 dt. 7th July, 1998 for Rs. 3,79,967 debited in the account of Krishna Industries in the books of the assessee has been deposited in the bank account No. 531 with Mehsana Urban Co-op. Bank Ltd. in the name of M/s

Adinath Corporation. It may also be relevant here to mention that the total purchases claimed to have been made by the assessee from M/s Adinath Corporation during the period from 8th April, 1998 to 7th July, 1998 was Rs. 2,16,13,276 out of which deposits in their bank account were only Rs. 2,10,54,076. This implies that remaining cheques must have been deposited by M/s Adinath Corporation in some other bank accounts.

(B)(ii) The bank account of M/s Tirupati Corporation was also opened with an initial deposit of Rs. 1,000 on 29th Sept., 1997. The cheques deposited in this account which are mostly from NKPL (assessee-company) are also followed by immediate withdrawal of an equivalent amount on most of the occasions leaving a balance of Rs. 7,616 on most of the days. Most of the cheques are either cash withdrawn or have been issued in favour of Triveni Corporation, as is apparent from the narration given in the copy of bank statement placed at pp. 67 and 68 of the paper book dt. 1st July, 2002 submitted by the assessee.

(B)(iii) The bank account of M/e Vimal Industries was also opened with an initial deposit of Rs. 1,000 on 18th June, 1998. The transactions of purchase bills obtained from this party pertained to the period from July, 1998 to December, 1998. M/s Vimal Industries had also withdrawn the amounts from time to time by way of self cheques soon after the respective cheques from various parties were credited. It is true that the total deposits in the account of M/s Vimal Industries with Mehsana Urban Co-op. Bank Ltd. account No. 1117 as per the assessment order for the period from 18th June, 1998 to 19th April, 1999 is Rs. 10,50,05,834 and purchases made by the assessee from this party has been shown at Rs. 11,48,34,121 only, which indicates that M/s Vimal Industries have received remaining cheques from various other parties and the Department has not been able to ascertain as to which other parties have made payments by cheques to M/s Vimal Industries. A perusal of bank account of M/s Vimal Industries submitted at pp. 69 to 78 indicates that substantial transactions have also continued in this account even after December, 1998, when the purchases by the assessee from this party had discontinued. After December, 1998, most of the withdrawals in the bank account of M/s Vimal Industries

are by way of cheques against which the expression "self" has not been mentioned in the copies of bank statements. This account has been finally closed on 12th May, 1999. No inquiry has also been made by the Department about destination of withdrawals made by cheques from this bank account. But the practice of withdrawing substantial amounts till the purchases by the assessee from M/s Vimal Industries continued to apply in the case of M/s Vimal Industries, though various payments even prior to December, 1998 have been made by cheques other than the cheques marked as "self" cheques.

(B)(iv) Krishna Industries : They opened bank account No. 4203 with Visnagar Nagrik Sahakari Bank Ltd. Usmanpura Branch on 30th June, 1998 with an initial deposit of Rs. 1,100. The total deposits in this bank account for the period from 30th June, 1998 to 21st July, 1998 were Rs. 29,93,310 as mentioned at p. 20 of the assessment order which tallies with copies of bank statement furnished at p. 79 of the paper book dt. 1st July, 2002. The assessee in the paper book has also submitted copy of bank statement of Krishna Industries with Mehsana Urban Co-op. Bank account No. 1130. This account was opened with an initial deposit of Rs. 1,000 on 2nd July, 1998. The total purchases claimed to have been made by the assessee from this party were of Rs. 3,19,56,782. The total deposits credited in the bank accounts of Krishna Industries as mentioned at p. 34 of the assessment order in Rs. 2,79,01,621. The deposits in bank account No. 4203 with Visnagar Nagrik Sahakari Bank were followed by withdrawal of an equivalent amount on the same day when the cheques were credited. However, most of the withdrawals in other bank account No. 1130 with Mehsana Urban Co-op. Bank are also by way of self cheques but there are other few withdrawals by way of cheques/DDs. For example there is a debit of Rs. 6,50,100 by way of demand draft dt. 28th July, 1998. Likewise, there are some withdrawals by cheques also. But most of the withdrawals from this bank account are by way of self cheques of substantial amounts withdrawn almost on the same day when corresponding cheques were credited in the said bank account.

(B)(v) Karnavati Industries : They also opened their account on 29th Dec., 1997 with initial deposit of Rs.

1,000. The total deposits in the said account from 29th Dec., 1997 to 29th Dec., 1998 are Rs. 12,30,13,608 as per copy of bank statement submitted at pp. 87 to 101 of the said paper book. The total purchase bills obtained by the assessee from this party were only of Rs. 38,10,000, A copy of account of Karnavati Industries in the books of assessee submitted at pp. 57 to 59 shows the total debits in this account to the tune of Rs. 2,28,77,001. The total credits have been shown at Rs. 2,26,14,069 for the period from 18th June, 1998 to 31st March, 1999. There is a closing balance of Rs. 2,62,932 as on 31st March, 1999. The nature of debits in this accounts have not been discussed. There are various credits in this account with the narration that the "amount received from Vimal Industries on their behalf". The debits are mostly supported by narration such as GJ-3T-2492 on 9th July, 1998 for Rs. 35,12,040. A perusal of the bank account shows that inspite of transactions running into more than Rs. 12 crores in this bank account, the balance at the end of most of the days throughout the period was ranging between Rs. 1,000 to Rs. 6,000.

(B)(vi) These are some of the unusual features pertaining to the bank accounts of these bogus suppliers. If they would have been genuine suppliers capable of supplying wash cotton seed oil to the tune of several lacs/crores in a short period like in the present case, they would surely invest adequate capital of their own, which in the present case, is not evident from their bank accounts which shows that all these accounts were opened with initial amount of Rs. 1000 or Rs. 1100 and balance in all these accounts for most of the times ranged between small figures of Rs. 1000 to Rs. 10,000. Had they really supplied the goods on credit of such large magnitude to the assessee, as claimed by the assessee, they will have some evidence of substantial contribution of capital and/or substantial credit purchases made from various mills/big traders. The debits in their bank accounts would have mostly been by way of crossed/account payee cheques issued in favour of those oil mills/big traders from whom they have purchased such material and in turn supplied to the assessee. The major withdrawals by self cheques immediately when the cheques in their bank accounts were credited exposes the impossibility of their having

supplied such material of lacs/crores of rupees on credit to the assessee.

(C) The ITO made inquiries from sales-tax authorities in respect of some of these suppliers. Those inquiries revealed that the copies of ration cards given by these name lenders to sales-tax Department were found to be fake, Copies of electricity bills did not pertain to the addresses given. Also the residential addresses of owners given to the sales-tax authorities were not correct.

(D) The notice sent by the IT authorities to these suppliers at the addresses given to the banks were returned back. The inquiries conducted through the inspector revealed that none of them existed at the given addresses.

(E) Most vital and significant evidence brought on records by the IT authorities is clear and categorical admission by all these parties in the form of affidavits/statements. Copies of affidavits/statements given by all these supplier concerns referred to in the assessment orders clearly indicate that all of them have clearly denied having supplied any material to the assessee, They also stated that they were being paid petty monthly amounts by Shri Nilesh K. Patel for signing cheques, bills and other documents in the names of these bogus concerns. The assessee contended, that no reliance on these affidavits/statements obtained by the Dy. DIT/Addl. DIT behind back of the assessee, should be placed, as they were not examined in the presence of the assessee nor the assessee was allowed to cross-examine them. It is pertinent to mention here that the AO vide very first questionnaire dt. 4th Dec., 2000 which is reproduced at p. 2 and 3 of the assessment order gave complete gist of inquiries conducted in respect of purchases made from these parties. Copies of all relevant statements/affidavits given by the owners of these supplier concerns had also been provided, as is evident from para 9 of the said letter dt. 4th Dec., 2000. The assessee furnished reply dt. 26th Dec., 2000. Copy of this letter has been placed on pp. 10 to 13 of the paper book submitted by the Department on 21st Oct., 2002. The assessee in this letter has submitted in para 8.1 that copies of accounts of all these five parties from the books of accounts of the assessee are furnished. In para 9 it has, inter alia, been stated as under:

"It may please further be noted that certain affidavits are there and certain other evidences were also found during search but since the transactions recorded in the books of account in the normal course and therefore it does not fall within the purview of block assessment."

It is apparent from the aforesaid letter that even after receiving the copies of affidavits/statements and other documents on the basis of which the AO suspected the genuineness of these purchases, the assessee did not ask the ITO to produce these suppliers and brokers for their cross-examination nor any material in rebuttal of such clinching and categorical denial by the suppliers and brokers, was furnished. The AO thereafter once again gave a show-cause notice dt. 8th Jan., 2001 which has been reproduced at p. 28 of the assessment order. The AO clearly stated that the purchases made from all these parties are bogus in nature. The gist of inquiries conducted by the Department along with the copies of statements/affidavits have already been given to the assessee along with the letter dt. 4th Dec., 2000, The assessee was given one more opportunity to explain the same.

64. The assessee submitted a reply dt. 22nd Jan., 2001 which has been reproduced at pp. 28 and 29 of the assessment order. In this letter the assessee has inter alia, simply stated as under:

"You have based your such opinion on the basis of statements and affidavits of certain parties.

In this connection, it may please be noted that as far as the company is concerned, the company has purchased the goods from these parties and has made the payment through a/c payee cheque which is not disputed by any of the above referred parties.

Further, it may please be noted that statements and affidavits appears to be similar. If the statements are recorded from different parties, contents are bound to be different."

The assessee did not ask the AO even at this stage to examine or cross-examine the suppliers and the brokers in their presence. The assessee only repeated the arguments

that material had really been received and the payments had been made by account payee cheques. It was also stated that since these transactions are recorded in the regular books of accounts, therefore, the question of considering the same in block assessment does not arise.

65. Thereafter, it appears that the affidavits of some of these suppliers retracting from their earlier affidavits given to Dy. DIT, were furnished in the course of assessment proceedings in the case of Shri Nilesh K. Patel. A copy of letter dt. 23rd Feb., 2001 from Shri Nileshbhai Patel to the Dy. CIT has been placed at pp. 30 to 32 of the Department's paper book. In this letter it has been stated that the original affidavits of proprietors of eight concerns including all these five parties in question in the present case are enclosed herewith. The affidavit of Shri J.J. Doshi, proprietor of M/s Adinath Corporation and M/s Tirupati Corporation, though specifically stated as having been enclosed with this letter dt. 23rd Feb., 2001 was not submitted with the said letter. Only four affidavits appear to have been submitted along with the said letter dt. 23rd Feb., 2001 in the assessment proceedings in the case of Shri Nileshbhai K. Patel. The learned Senior Departmental Representative submitted that these affidavits were submitted at the fag end of the period of limitation in the case of Shri Nilesh K. Patel. The affidavit of Shri J.J. Doshi, who is proprietor of two parties, namely, M/s Adinath Corporation and M/s Tirupati Corporation was submitted to the AO along with the letter dt. 20th April, 2001. Copy of the letter has been placed at p. 29 of the Departmental paper book. It was pointed out by the learned Senior Departmental Representative that 20th April, 2001 was Friday. The next two days were holidays being Saturday and Sunday. One more holiday was there on 27th April, 2001 on account of Mahavir Jayanti. The case was going to be barred by limitation of time on 30th April, 2001. The assessee produced all these affidavits at the fag end of the assessment proceedings, when it was soon going to be barred by limitation of time. No request for cross-examination of these suppliers or brokers was made by the assessee in any of the letters submitted to the AO during the course of assessment proceedings.

66. The burden lies on the assessee to prove that the suppliers were genuine suppliers and they really had

capacity to supply wash cotton seed oil of such large magnitude costing several lakhs/crores within such short period and they in fact had supplied such material to the assessee. In the normal course, if these purchases of Rs. 11.99 crores would have really and genuinely been made from these parties, as claimed by the assessee, the assessee would at once raise a strong protest after receiving the copies of statements of those suppliers/brokers explicitly and emphatically denying such transactions and the assessee would have submitted in the very first reply to show-cause notice dt. 4th Dec., 2000 that their affidavits are blatantly false and all these persons should be examined in their presence. The assessee should have himself produced all these suppliers/brokers soon after the receipt of first show-cause notice or well before the completion of the block assessment before the AO to acquaint him with the reality in rebuttal of those affidavits/statements obtained behind his back by the Dy. DIT. The assessee simply submitted the affidavits of these suppliers at the fag end of the assessment proceedings and did not produce these suppliers before the AO along with their books of accounts and records from which the capacity of the suppliers and the reality and genuineness of credit sales of such large magnitude made by them to the assessee could have been verified. The assessee also did not produce the brokers through whom it was stated by Shri Nileshbhai Patel that the purchases from these parties were made through them. The suppliers who could give their affidavits subsequently in which they have retracted from their earlier affidavits/statements to Dy. DIT, were therefore fully co-operating with the assessee and there is no reason as to why the assessee did not or could not produce them before the AO for their examination along with the relevant records.

67. In the interest of fair play and justice, a specific opportunity was given to the learned counsel appearing for the assessee during the course of hearing before us, to produce all these suppliers along with their records before the Tribunal. The learned counsel after a deep consideration submitted a reply on the next date of hearing that the assessee cannot produce any of those suppliers before the Tribunal, as they are not under the control of the assessee. It is well settled law that onus lies on the assessee to support its claim for grant of deduction

of any expenditure. Therefore the onus to prove the genuineness of purchases from these parties lies on the assessee. Such a burden, in the instant case, was very heavy in view of clear and unequivocal affidavits/statements given by suppliers. It is equally well settled law that an admission made by the concerned persons is an extremely important piece of evidence. It is true that it cannot be said to be conclusive. The party who wants to retract from an earlier admission can show that it was obtained under coercion and it is incorrect. However allegation of coercion cannot be accepted on a mere statement; it is to be supported by positive evidence. Likewise the incorrectness of earlier admission also has to be proved by producing cogent material and evidence. The assessee rested with submission of subsequent affidavits of suppliers. The least, in rebuttal of earlier affidavits/statements, which the assessee should have done, in addition to submission of their affidavits, is to produce all those suppliers and brokers along with the books of accounts, purchase vouchers and evidence to show their capacity to supply goods worth several lakhs/crores in such short period. The assessee obtained those subsequent self-serving affidavits from the suppliers. Therefore, the onus lies upon the assessee to produce those persons along with their records, to prove that earlier affidavits do not contain true and correct facts and were obtained under coercion. The assessee failed to produce them before the AO. They have also failed to produce them before the Tribunal along with their relevant records, though a specific opportunity was granted to them during hearing. All these facts prove beyond doubt that all the five supplier concerns were created/floated only for the purposes of issuing fake/fictitious bills. They had no capacity to supply wash cotton seed oil of such large magnitude to the assessee. They also did not have adequate capital and infrastructure for carrying out business of such large scale. None of them appear to be existing income-tax assessee as GIR Number/PAN Number and ward, etc. are not stated in any of their affidavits. We therefore agree with the findings of the learned Departmental authorities that all these suppliers were only name lenders/billing agents. The purchases claimed to have been made by the assessee from them do not represent genuine purchases made from those parties.

68. The question still remains to be considered is as to whether the assessee had in fact received the material in question which was claimed as allegedly purchased from these name lenders/billing agents. The evidence existing on records, which will be discussed in details hereinafter, indicates that the material in question "wash cotton seed oil" shown as purchased through such fictitious invoices obtained in the names of five bogus parties, appear to have really been received. Such evidence on records are briefly as follows:

(A) Various records of contemporary period including general inward register, daily gate outward register were found and seized during the course of search. Gate outward register was maintained by security staff of the factory of NKPL. In the assessment order, the AO while placing reliance on the statement of Shri Kamlesh L. Patel has observed that certain purchases are not found in the inward register, which is most reliable and authentic register. The assessee gave explanation vide letter dt. 22nd Jan., 2001 and stated that all the purchases from these parties have duly been recorded in the seized inward register and the same are verifiable from the regular books of accounts as well as inward register, stock register lying seized with the Department. The AO has not adversely commented on the aforesaid submissions made on behalf of the assessee during the course of assessment proceedings.

(B) The Tribunal required the learned Senior Departmental Representative to verify from the seized inward register/daily gate outward register lying seized with the Department, the fact whether entries in respect of receipt of material represented by these fictitious invoices are recorded in such daily gate outward register/inward register. The learned Senior Departmental Representative vide para 3.12 of his written submissions has admitted that all the entries of such purchases made from bogus parties are appearing in the inward register but he has pointed out certain strange coincidence in relation to those entries. For instance, he has pointed out that nine trucks shown as per inward register 2311 to 2319 have been shown as received on 16th Nov., 1997 from M/s Tirupati Corporation. All such nine trucks have been emptied within one hour and 15 minutes as per inward

and outward time recorded in the said register. It has been pointed out that the tankers received from other regular dealers have taken more than 4 to 5 hours in carrying out the entire process of unloading which includes weighment, taking sample from the tanker for the purpose of checking the quality, colour and odour and then after obtaining lab report it has to be emptied in the assessee's tanks. The assessee in the rejoinder has replied that they had adequate capacity to unload 10 to 12 tankers at their unloading station. It has also been submitted that there are other instances where third parties have unloaded their tankers within such short time. The day-to-day stock records are prepared on the basis of raw material entered into the said inward register. The receipt of material is also corroborated by various other documents of contemporary period such as weighment of the material inward receipts and analysis reports etc. All these documents were furnished to the AO to prove the fact of real receipt of material shown as purchased through such fictitious invoices.

(C) The learned CIT(A) called for a remand report from the AO during the course of appellate proceedings before him. As already stated hereinbefore, the AO in his remand report dt. 26th Dec., 2001 has clearly stated that the test check of the purchase bills and other supporting documents with reference to inward register, stock register etc. have been made and it is found that the entries in respect of purchases made from the above parties are entered and consumed. This remand report given by the AO after verifying the relevant facts stated in the documents produced by the assessee with the contents of seized registers, provide a clinching proof in favour of the assessee's contention that the material in question had really been received and used in the process of production.

(D) One more vital evidence which supports the assessee's contention about real receipt of material in question is that a detailed stock inventory was prepared by the authorised officers of the Department at the time of conducting the search on 24th Feb., 1999 and 29th Feb., 1999. The AO required the assessee to reconcile the stocks found during the course of search with the stock records and financial books of accounts. The assessee submitted a reply vide letter dt. 14th March, 2001 in which it was

stated that complete reconciliation of stock found during the course of search and as per books of accounts is enclosed from which it would be seen that all the items found as per the stock inventory prepared at the time of search are fully verifiable as per the stock records maintained by the assessee-company. The AO accepted this explanation after detailed verification and no addition has been made in the assessment order in relation to any unexplained stocks found during the course of search. This also proves the fact that the material in question had really been received.

69. Now let us consider the assessee's submissions that assuming that the purchase invoices were obtained from name lenders/billing agents but the material has really been received/purchased, the assessee is entitled to deduction of reasonable price in respect of such material purchased and consumed. The AO has also reported in the remand report submitted to the CIT(A) that such purchases have been made almost at the prevailing market rate/price charged by other regular dealers. Therefore no disallowance of any part amount would be justified in the present case, as was done in the case of Vijay Proteins Ltd. (1996) 55 TTJ (Ahd) 76 : (1996) 58 ITD 428 (Ahd) or in some other cases. He also pointed out that part disallowances made in respect of inflation of purchase price made in the cases of Adinath Industries and Arun Industries have been deleted by the Tribunal and those orders of the Tribunal have been confirmed by the Hon'ble Gujarat High Court. The judgment of the Hon'ble Gujarat High Court is binding, says the learned counsel. We have already indicated while discussing the ratio of principles laid down by the Hon'ble Gujarat High Court in these two cases that the facts of the present case are totally different. In the present case there is an unequivocal, clear and emphetic denial by these suppliers as well as brokers in their first affidavits/statements submitted to the Dy. DIT. The assessee has not produced those suppliers/brokers before the AO along with the relevant records. The Tribunal also gave the assessee a specific opportunity to produce those suppliers/brokers along with their books of accounts and other relevant records. The assessee has expressed their inability to produce them before the Tribunal. The facts of those two cases are therefore totally distinguishable as in those

cases there was no such clear but categorical denial by the brokers/suppliers. The assessee must have obtained fictitious bills from such billing agents/name lenders with a view to derive some definite gain. It is true that the material in question was received by the assessee but those materials were not received from these billing agents/name lenders" but were received from undisclosed sources or from unknown parties, which was within special and exclusive knowledge of the assessee and the assessee is not willing to disclose the true facts to the Department. It is well known that unaccounted material may be available in the market at much lower price as compared to the purchases made from genuine dealers on the strength of genuine bills. The real suppliers may be willing to sell those products at a much lower rate in view of manifold reasons. There may be saving on account of excise duty, sales-tax or other taxes which may be leviable in respect of manufacture and sale of such goods. The real suppliers or the oil mills may derive substantial saving of income-tax in respect of income from sale of unaccounted goods produced and sold by them. There may be various factors due to which sellers may be willing to charge lower rates for unaccounted goods as compared to accounted goods. The assessee is engaged in the business which is subject to frequent checking by civil supply department of the State Government. The regular checks are made at the factory premises in order to verify whether hoarding is done or not. Thus, there is effective check by food and civil supplies department of the State Government so far as quantitative details are concerned. The main area left with the concerns like the assessee would, therefore, be suppression of income by inflating the purchase price of raw material. Such material received by the assessee from unknown suppliers or from undisclosed sources also enable the assessee to utilise their black money/unaccounted funds for making purchases of such raw material in cash from open market. The assessee has shown credit purchases from these name lenders/billing agents. A statement of peak has been reproduced in earlier part of this order which shows that the peak amount credited in the account of one of these name lenders/billing agents relating to credit sales alleged to have been made by them to the assessee is Rs. 1,54,14,534. This only gives an idea of the large amount of black money kept utilised by the assessee for making

unaccounted purchases from open market in cash and obtaining the bills from billing agents/name lenders to record such quantity of material purchased in their stock registers, to meet the effective checking done by the civil supply department and by other departments. The assessee has not only derived the benefit of circulation of large black money for purchases of such unaccounted material from open market but has also derived extra profit by purchasing them at a much lower rate from the real suppliers/mills, who had really supplied the material in question to the assessee. Therefore what was actual profit derived by the assessee from such device/practice adopted by them is exclusively known to the assessee, The assessee does not want to tell the truth but simply wants to have total deletion on technical and legal grounds which have no valid base whatsoever.

70. The question which now arises for our consideration is as to whether the entire amount of the said bogus purchases should be disallowed or the assessee should be held to be eligible for grant of deduction of a reasonable amount of purchase price of wash cotton seed oil which in fact had really been received by the assessee but was sought to be supported by fictitious invoices obtained from billing agents/name lenders. It is well settled law that tax can be levied only on real income. It is an elementary rule of accountancy as well as of taxation laws that profit cannot be ascertained without deducting cost of purchases from sales, otherwise it would amount to levy of income-tax on gross receipts or on sales. Such recourse is not permissible under any provisions contained in the IT Act. The facts and discussion made hereinabove show that the purchase invoices obtained from five name lenders/billing agents are fictitious. The material and evidence found during the course of search and post-search investigation conducted by the officers of the Department have adequately exposed the falsity of such entries of purchases made in the regular books of accounts. The undisclosed income derived by the assessee out of purchases aggregating to Rs. 11.99 crores shown as having been purchased from these billing agents/name lenders will, therefore, have to be estimated on a reasonable and rational basis so as to determine the figure of undisclosed income liable to tax in the block assessment under Chapter XIV-B. The entire amount of bogus purchases cannot be

treated as undisclosed income/concealed income, because material in question had really been received. The inflated portion of purchase price mentioned in the fictitious invoices are within exclusive knowledge of the assessee. The assessee is not willing to tell the truth. Therefore, the estimate of such undisclosed income liable to tax in block assessment in relation to such bogus purchases of Rs. 11.99 crores will have to be made. As already stated hereinbefore, the real mills/wholesale dealers genuinely engaged in sale and supply of such material may be willing to sell such unaccounted goods at a much lower rates in view of various manifold advantages, such as savings in all kinds of taxes, duties, utilisation of black money and various other factors, The legislature in its wisdom has amended Section 40A(3)by the Finance Act, 1995 w.e.f. 1st April, 1996 which provides for disallowance of 20 per cent of such expenditure incurred otherwise than by crossed or account payee cheques. This figure of 20 per cent must have been arrived at by taking into consideration all the relevant facts. This 20 per cent disallowance is contemplated in cases where black money is not employed in respect of such unaccounted purchases. It is applicable only in cases where the payment of expenditure exceeding Rs. 20,000 is made otherwise than by a crossed cheque or crossed demand draft. Here is a case where not only the benefit by way of avoidance of various kinds of taxes such as excise duty, sales-tax at various stages of inputs are there but it is a case where such purchases on the strength of fictitious invoices given by the billing agents/name lenders are treated as credit purchases. Therefore, while estimating the amount liable to be treated as undisclosed income in relation to such purchases aggregating to Rs. 11.99 crores, the question relating to unexplained non-genuine credit shown in the accounts of these name lenders/billing agents will have to be kept in mind. The assessee's counsel contended that no such addition was made by the AO under Section 68 nor Section 68 applies in relation to such credit purchases. All these facts and decisions submitted by the learned counsel are not relevant because we are not making any fresh addition in respect of any unexplained cash credit but this vital factor is being taken into consideration while estimating the amount of undisclosed income liable to tax in the block assessment in relation to such purchases of Rs. 11.99 crores. The peak credit as on

any one date in the account of one of these billing agents/name lenders is Rs. 1,54,14,534. This chart was submitted by the learned Senior Departmental Representative and copies were given to the learned counsel for the assessee. No mistake in the said peak statements were pointed out by the learned counsel. The addition in respect of such unexplained part credit in the accounts of bogus suppliers can be made under Section 68 or 69C in view of decisions in the cases of Vijay Proteins Ltd. (supra) and is also supported by judgment of Hon'ble Rajasthan High Court in the case of Indian Woollen Carpet Factory v. ITAT. No separate or fresh addition is being made by us but this important factor is taken into consideration as to how much addition out of addition of Rs. 11.99 crores should be sustained. Apart from this the estimate of 25 per cent disallowance made in the case of Vijay Proteins (supra) is also relevant as that case relates to a concern engaged in the similar nature of business and there also purchase invoices were obtained from billing agents/name lenders but material in fact had been received from unknown sources. The Tribunal after a careful consideration in that case confirmed the disallowance of 25 per cent out of total amount of such bogus purchases. No separate addition was made in respect of peak credit in the accounts of those bogus suppliers as the amount of disallowance made at the rate of 25 per cent adequately covered the amount of unexplained peak credit. One of us (AM) was a party to the said decision in the case of Vijay Proteins Ltd. (supra).

71. On a careful consideration of the entire relevant facts, we are of the opinion that it would be just and proper to direct the AO to restrict the addition on account of inflated purchases to 25 per cent i.e. Rs. 3 crores which is approximately equal to 25 per cent of Rs. 11.99 crores shown to have been purchased from these five bogus suppliers.

72. Now we will deal with ground No. 4 raised in NKPL's appeal. The assessee has challenged the confirmation of an addition of Rs. 3,86,968 being the profit on alleged sales made by the company. The AO has dealt with this issue in para 8 on p. 35 and onwards of the assessment order. During the course of search, one loose paper file was seized from the premises of NKPL, which is marked

as Annex. A-G of Panchnama prepared at the time of search. In this file, certain sale bills of NKIL in respect of sales made to NKPL were found. The said file also contained certain sale bills issued by NKPL in respect of sales made to Triveni Corporation and Tirupati Corporation. These bills of purchases and sales found from the said seized file were not accounted for in the books of accounts of the assessee as well as in the books of NKIL. Before the AO, it was submitted on behalf of the assessee that the assessee-company raised certain sale bills in favour of Triveni Corporation and Tirupati Corporation in anticipation of goods to be purchased from NKIL. Finally, NKIL could not deliver the goods and therefore, the company also did not give delivery to Triveni Corporation and Tirupati Corporation. Therefore all these purchase and sale bills are cancelled bills. No actual purchase of goods or sale of goods was made by the assessee. The delivery of the goods was also not effected. This fact was verifiable from the inward register lying seized with the Department in which such transactions are not recorded. The assessee-company has also not received any payment from Triveni Corporation and Tirupati Corporation in respect of these sale bills which can be verified from their bank statements available with the IT Department. The company also passed a board resolution for cancellation of the bills in respect of abovereferred transactions. A copy of board resolution was also submitted to the AO. The AO considered the submissions made on behalf of the assessee. It was found that the seized bills bear the gate entry numbers at the factory premises of NKPL. Therefore, there is no doubt that the assessee made purchases from NKIL and also sold the goods to Triveni Corporation and Tirupati Corporation as per purchase bills and sale bills found and seized in the file marked as Annex. A-6. The AO therefore made an addition of Rs. 2,01,99,793 in respect of unaccounted purchases from NKIL for the block period for asst. yr. 1998-99. The AO also made separate addition in respect of unaccounted sales so made to Triveni Corporation and Tirupati Corporation on the basis of sale invoices found and seized in file marked as Annex. A-6. The addition in respect of unaccounted sales was made to the tune of Rs. 2,05,86,761.

73. The learned CIT(A) has dealt with this issue in paras 8 to 8.2 on pp. 24 and 25 of his order. The learned CIT(A) has observed that since both the concerns, viz. NKPL and NKIL belong to the same group and addition on account of unaccounted sales has already been confirmed by him in the case of NKIL, no further addition can be made in respect of unexplained purchases in the hands of the appellant. Since what can be taxed is only the profit on the aforesaid sales of Rs. 2,05,86,761, after reducing Rs. 2,01,99,793 being the cost of purchases made by the assessee from NKIL, addition should be sustained only to the tune of Rs. 3,86,968 in substitution of both the aforesaid additions made by the AO. The CIT(A) accordingly sustained the addition of Rs. 3,86,968.

74. The learned counsel appearing on behalf of the assessee reiterated his arguments as were made before the learned Departmental authorities, In the written submissions submitted before the CIT(A), it was submitted vide paras 4.2 to 4.4 that these transactions had not actually taken place. It was admitted that there was a seal of sale entry on the bills of NKIL but the transactions did not finally take place. This can be verified from the day-to-day stock register maintained by NKIL and NKPL. No evidence whatsoever has been adduced by the AO to prove that the assessee has in fact purchased and sold wash cotton seed oil. The addition cannot be made merely on the basis of certain loose papers found during the search. Copy of board's resolution confirming the cancellation of these bills was also furnished at the time of assessment. An alternative prayer was also made before the CIT(A) that if the assessee's contention is not accepted, then only profit on such sales amounting to Rs. 3,86,968 can be taxed. The CIT(A) after considering these submissions confirmed the addition to the extent of Rs. 3,86,968. The learned counsel on the strength of similar arguments urged that the addition of Rs. 3,86,968 should be cancelled.

75. The learned Senior Departmental Representative, on the other hand, vehemently contended that the CIT(A) has erred in deleting the addition of Rs. 2,01,99,793 being purchases made from NKIL, which are proved beyond doubts from the sales invoices issued by NKIL in favour of NKPL, which were found and seized from the business premises of NKPL. Those sale bills bear the gate entry

number. It also contains all other particulars such as truck number etc. A subsequent resolution of the board cannot nullify the facts so clearly revealed from the documents found and seized during the course of search. The CIT(A) has grossly erred in directing the AO to restrict the addition to Rs. 3,86,968. The learned Senior Departmental Representative made elaborate arguments in this regard in para 3.12 of his written submissions dt. 29th Oct., 2002 which have been reproduced hereinbefore. It has been mentioned in the said letter that what was purchased by the assessee from NKIL through such sale bills issued by NKIL was wash cotton seed oil. However, copies of sale bills issued by NKPL (the assessee) to Triveni Corporation and Tirupati Corporation are for sale of soyabean oil. How can a person sell soyabean oil out of purchase of wash cotton seed oil, The learned Senior Departmental Representative has also pointed out that there are some entries in the inward register in the name of M/s Kothari Global which bear the same truck numbers and same weight, quantity of wash cotton seed oil which are mentioned in the sale bills issued by NKIL in favour of NKPL, lying amongst seized sale bills file. The assessee has not given any specific reply to the aforesaid submissions made in the written submissions given by the learned Senior Departmental Representative that what was purchased through these sale invoices issued by NKIL to NKPL was wash cotton seed oil and what was sold by the assessee to Triveni Corporation and Tirupati Corporation was soyabean oil. Copies of some relevant seized documents have been submitted by the Department in their paper book dt. 22nd Oct., 2002. Copies of bills issued by NKIL to NKPL included in Annex. A-6 clearly shows that the sale invoices were issued by them for wash cotton seed oil. It also bears truck numbers, delivery challan numbers and inward date and number and date on the seal of NKPL. The sale invoices issued by NKPL in favour of Triveni Corporation and Tirupati Corporation are for "Exp. Soyabean Oil". These bills also contain truck numbers and delivery challan numbers, etc.

76. The assessee in the rejoinder has simply stated in para 13.1 that the allegation of the learned Senior Departmental Representative that the supplies by M/s Kothari Global is not correct since Kothari Global has supplied from some traders or manufacturers nearby

Ahmedabad. The supply was in December, 1997. The old records are not available. Further it was also mentioned that such evidence is being produced for the first time before the Tribunal. Such objection was not raised by the Addl. DIT or by the AO or CIT(A). The same cannot therefore be raised for the time before the Tribunal.

77. We have considered the submissions made by the learned representatives of both sides and have gone through the orders of the learned Departmental authorities. The contention of the assessee that submissions made with reference to entries of material received from Kothari Global constitute additional evidence, is not correct. Such a submission has been made on the basis of seized inward register of NKPL lying seized with the Department. The assessee has himself heavily relied upon the entries of the said register while dealing with the main ground of addition relating to receipt of material purchased from bogus suppliers. It is evident from the photo copies of sale invoices issued by NKIL to NKPL and from copies of sale basis issued by NKPL to Triveni Corporation and Tirupati Corporation that what was purchased by the assessee from NKIL was wash cotton seed oil and what was sold by the assessee to Triveni Corporation and Tirupati Corporation was soyabean oil. These two items of purchase and sale reflected from the seized invoices have no nexus with each other. The entries in the seized inward register and outward register are also required to be thoroughly checked with reference to the quantity weight and truck numbers mentioned in these invoices forming part of A-6 in the light of similar material claimed to have been recorded as received from Kothari Global. Nature of purchases from Kothari Global have to be examined with reference to their invoices and its comparison with seized invoices.

78. On a careful consideration of the entire relevant facts, we are of the considered opinion that the orders passed by the CIT(A) and the AO in relation to this ground should be set aside and the matter should be restored back to the AO with a direction to decide the same after conducting a deep investigation. The AO should examine each invoice of sale and purchase found and seized as per Annex. A-6 and verify the same with the entries of relevant dates in the

seized inward and outward registers. He should also examine the original minute book. In case he considers it necessary he may examine the concerned persons of the respective concerns who prepared these sale and purchase invoices/bills which were found and seized during the course of search and which according to the assessee did not represent real transactions. The AO will pass fresh order after conducting proper investigation in accordance with the provisions of law and after providing adequate and reasonable opportunity to the assessee.

79. Ground No. (6) relates to levy of interest under Section 158BFA(1). No arguments were advanced by the learned representatives of both sides in relation to this point. The AO is directed to grant consequential relief.

80. Ground No. (7) relates to initiation of penalty proceedings under Section 271(1)(c). No such ground can be raised in an appeal against the assessment order. Separate appeal will lie against any such penalty, if and when levied. This ground is therefore infructuous and is rejected accordingly.

IT(SS)A No. 41/Ahd/2002 in the case of N.K. Proteins Ltd. :

81. We will now deal with the cross appeal submitted by the Revenue in the case of N.K. Proteins Ltd. being IT (SS) A No. 41/Ahd/2002. The Revenue has raised the following two grounds in this appeal:

"1. The learned CIT(A) has erred in law and on facts in deleting the addition of Rs. 31,48,13,392 made on a/c of unexplained investments.

2. The learned CIT(A) has erred in law and on facts in deleting the addition of Rs. 2,01,99,792 made on a/c of unexplained purchases."

82. The AO has discussed this point in para 7 on pp. 34 and 35 of the assessment order which is reproduced as under:

"7. Unaccounted payments:

As already discussed in the preceding paras, certain bank accounts were found during the course of search of different concerns. After inquiries it was held that these concerns are bogus and purchases made by the assessee from these concerns are added as bogus purchases. From the perusal of these bank accounts, it is noticed that these are in following names :

		Rs.
1.	Adinath Corporation	2,10,54,076
2.	Tirupati Corporation	3,33,07,324
3.	Vimal Industries	7,26,74,355
4.	Karnavati Industries	12,34,73,600
5.	Krishna Industries	2,79,01,621
6.	Triveni Corporation	3,64,01,356
Total		31,48,12,332

These also represent payments made by assessee group concerns for purchases and other expenses. Inquiries are being conducted from banks to find out the concerns which made these payments for purchases and other expenses. Substantive disallowance will be made in these concerns after conclusion of inquiries. However, protectively the addition is made in the case of the assessee being unaccounted payments in asst. yr. 1999-2000.

(emphasis, italicized in print, supplied by us) Therefore total amount of Rs. 31,48,12,332 is added as unaccounted

payments for the block period in respective assessment years as under:

Asst yr.	Amount
1998-99	Rs. 2,12,73,188
1999-2000	Rs. 29,35,39,144

(Unaccounted payments Rs. 31,48,12,332)"

83. The addition of similar nature was in the case of NKIL which is subject-matter of revenue's appeal in IT(SS)A No. 38/Ahd/2002. Ground No. (2) of Revenue's appeal in IT(SS)A No. 38/Ahd/2002 in the case of NKIL relates to deletion of addition of Rs. 6,63,19,496 made in respect of alleged unexplained deposits in the accounts of bogus suppliers. The said point has been discussed in para 13 of assessment order passed in the case of NKIL which is reproduced below:

"13. Unaccounted payments:

As already discussed in the preceding paras, certain bank accounts were found during the course of search of different concerns. After inquiries it was held that" these concerns are bogus and purchases made by the assessee to these concerns are added as bogus purchases. From the perusal of these bank accounts, it is noticed that in the bank account of Krishna Marketing, total amount of Rs. 2,47,14,062 is deposited during the financial year 1998-99. In the bank account of Somnath Industries total deposits made is amounting to Rs. 3,24,57,568 during the financial year 1998-99. These also represent payments made by assessee group concerns for purchases and other expenses. Inquiries are being conducted from banks to find the concerns which made these payments for purchases and other expenses. Substantive disallowance will be made in these concerns after conclusion of inquiries, However, protectively the addition is made in the case of the assessee being unaccounted payments in asst. yr. 1999-2000.

In the bank account of Sejal Enterprises, total deposit is made amounting to Rs. 91,47,866 by the assessee for which no explanation was furnished by the assessee. Therefore, amount of Rs. 91,47,866 is added as unaccounted payments in the hands of the assessee for the block period in the asst. yr. 1999-2000.

(Unaccounted deposit Rs. 91,47,866) (Unaccounted payments Rs. 5,71,71,630)"

84. The additions in respect of deposits in the accounts of these alleged bogus suppliers have also been made in the case of Shri Nileshbhai K. Patel on substantive basis. A show-cause notice was issued by the AO on 18th Jan., 2001 to Shri Nileshbhai K. Patel in which it was stated that several blank cheque books and vouchers of number of concerns were found and seized at the office premises of NKPL. The affidavits were filed by the owners of those concerns. From all these affidavits it is clear that these are bogus concerns created by you. The business of these concerns were totally managed by you. The bank accounts relating to those concerns were also managed by you as stated by so-called proprietors of these concerns. The AO, therefore, required the assessee to explain as to why the amounts deposited in the bank accounts of these suppliers be not treated as unaccounted income of the assessee. The details of amounts deposited in these bank accounts were given in the aforesaid show-cause notice as under;

No.	Name of the holder	Amount credited
1.	Krishna Industries	29,93,310
2.	Triveni Corporation	3,64,01,356
3.	Karnavati Industries	12,30,13,600
4.	Adinath Corporation	2,10,54,076
5.	Tirupati Corporation	3,33,37,324
6.	Vimal Industries	10,50,05,834
7.	Krishna Industries	6,52,08,617
8.	Somnath Industries	3,25,77,224
9.	Krishna Marketing	2,47,14,062
	Total	44,43,05,403

It appears that these deposits in the bank accounts of these suppliers are for the period upto the date when copies of their bank accounts were obtained by the Dy. DIT/Addl. DIT. However, details in respect of deposits in their bank accounts upto the date of search i.e. 24th Feb., 1999 have been given in para 10 on p. 33 of the assessment order, which are as under:

……..

85. The AO relying upon the affidavits of those suppliers obtained by the Dy. DIT, which have been discussed while dealing with the issue relating to bogus purchases, made an addition of Rs. 37,19,85,062 which was bifurcated in two years falling in the block period as under:

…….

……..

The AO has briefly discussed the evidence against the assessee in relation to such bogus suppliers which, inter alia, include the affidavits/statements given by the suppliers denying having supplied any goods to NKPL and NKIL and statements of brokers and other facts discussed in the assessment orders passed in the case of NKPL and NKIL. The AO has also discussed various replies and affidavits of suppliers submitted on behalf of the assessee in rebuttal of the earlier affidavits. The AO

thus made an addition in respect of entire amount found credited in the bank accounts of these so-called bogus suppliers aggregating to Rs. 37,19,85,062 in the hands of Shri Nileshbhai K. Patel on substantive basis,

86. Before the CIT(A) the assessee prepared and compiled the details from copies of bank accounts of these suppliers supplied by the Department to the assessee and furnished the following summarised details.

"The details of deposits of cheques in the bank account from the above referred companies and outsiders are given below :

Name of Suppliers Amount received by cheque from NKPL Amount received by cheque from outsiders Total amount received Somnath Industries 1,05,26,152 2,19,31,416 3,24,57,568 Krishna Marketing 51,67,228 1,95,46,834 2,47,14,062 Sejal Enterprises 1,26,48,060 from NKPL 2,83,41,440 4,14,78,250 5,71,71,630 Vimal Industries 1,48,34,121 5,78,40,234 7,26,74,355 Karnavati Industries 38,10,000 11,96,63,600 12,34,73,600 Adinath Corporation 2,16,13276 2,10,54076 Tirupati Corporation 4,76,93,575 3,33,07,324 Krishna Industries 31,95,67,82 27902721 11,99,07,754 17,75,03834 27,84,12,076 Triveni Corporation(Goods are sold by NKPLand sale proceeds areaccounted for in thebooks) 3,64,01,316 Total 14,82,49,194 21,89,82,084 37,19,85,062

87. It was submitted before the CIT(A) that so far as payments aggregating to Rs. 2,83,41,440 and Rs. 11,99,07,754 mentioned in the aforesaid chart are concerned, these payments were made by NKIL and NKPL respectively to these suppliers by cheques. Hence deposits in the bank accounts of these suppliers to the extent the deposits representing cheques received from NKIL and NKPL, cannot be treated as unexplained deposits. The issue relating to alleged bogus purchases made by NKPL and NKIL from these concerns has been dealt with separately in the respective assessment orders but those payments made by cheques by NKIL and NKPL by no stretch of imagination be treated as unexplained deposits in the bank accounts of those bogus suppliers. The same addition cannot be made in the hands of either NKIL or NKPL, nor in the case of Shri Nileshbhai K. Patel. As

regards the deposits aggregating to Rs. 21,89,82,084 are concerned, it was contended that all these deposits in the bank accounts of various suppliers have been received by cheques from other parties. The AO has brought no material on record to show that such undisclosed deposits in the bank accounts of these suppliers were made by NKIL or by Shri Nileshbhai K. Patel, On the other hand, the AO, while passing the assessment orders in the cases of NKIL and NKPL, had observed that the inquiries would be made in relation to those deposits by cheques in the accounts of these suppliers to find out which other concerns have made payments by cheques to these suppliers and substantive additions will be made in the hands of those concerns after necessary inquiries and investigation. The assessee has placed reliance on the following judgments before the CIT(A):

(i) CIT v. Daulatram Rawatmal (1973) 87 ITR 349 (SC)

(ii) Parakh Foods Ltd. v. Dy. CIT (1998) 64 ITD 396 (Pune)

(iii) Omkarmal Gaurishankar v. ITO (1991) 39 TTJ 223 (Ahd)

(iv) Dimco Silk Mills v. ITO (1999) 107 Taxman 41 (Mag)

88. The CIT(A) after considering the entire relevant facts and material gave the following findings in para 4.8 of his appellate order in the case of Shri Nileshbhai K. Patel.

"4.8 I have carefully considered the submissions made by the appellant's counsel, Shri Ashwini Shah and have also perused the facts of the case laws cited and also the materials which was found during the course of search and also further inquiries conducted by the AO during the course of assessment. After perusing the said materials and records, I have no hesitation in holding that the inference drawn that the moneys deposited in the said accounts belong to the appellant is not supported by sufficient evidence for the following reasons:

(a) The appeal in respect of NKIL has been disposed of by the undersigned as per order dt. 16th Jan., 2001 while appeal in respect of NKPL has been disposed of by the undersigned as per order dt, 21st Jan., 2002. For the sake

of convenience, the various contents and facts relating to the statements and evidences discussed by the AO in the block assessment order of the appellant, are not discussed again. The same have been elaborately discussed therein. In the case of Sejal Enterprises, addition of Rs. 1,26,48,060 was upheld on account of bogus purchases in the case of NKIL whereas finding was given that, in respect of Somnath Industries and Krishna Marketing, there was no material for considering the additions under Section 158BC, in the absence of any material discovered during the course of search. Similarly, in respect of bogus purchases relating to Vimal Industries, Karnavati Industries, Adinath Corporation, Tirupati Corporation, Krishna Industries totalling Rs. 11,99,07,754 was upheld in the orders of NKPL as discussed above. It was noted that the said payments originated in the books of NKIL and NKPL and were through cheque payments and the transactions have been duly reflected in the books of NKIL and NKPL. Thus, the source of the said deposits stands established.

(b) In respect of deposits of Rs. 21,89,82,084, the amount is stated to be received from outsiders i.e. other than NKIL and NKPL. The AO has not brought any evidence in this respect that the appellant was benamidar of such parties. As a matter of fact, even the names of parties from whom such amounts have been received and deposited in the said bank accounts have not been discussed anywhere in the assessment order. The only reference made by the AO is at p. 39 of the order in the case of NKIL and at p. 35 of the order in the case of NKPL, in which the AO had observed that inquiries will be made in respect of those concerns and substantive addition made in those cases. In view of these facts, there is no justification for treating the same as undisclosed income of the appellant and that too without any finding or supporting evidence emerging out of search action under Section 132 in the case of appellant.

(c) In respect of the amount of Rs. 3,64,01,316 as stated in the written submissions before me, the amount is represented towards sale by NKPL and the transactions are duly recorded in the books of account. There is no finding that the source of the same is the appellant or that it is based on any material discovered as a result of search.

(d) The appellant has strongly submitted that the transactions between the account holders and the appellant are only in the capacity of his being MD of NKIL and NKPL and that he has never done any business in his individual capacity. It is further submitted that no adverse inference can be drawn for mere introduction to the proprietor of the concern for opening a bank account. Reliance is placed on the decision of Tribunal, Ahmedabad in the case of Dimco Silk Mills v. ITO (supra) which is relied upon as mentioned earlier in this order. It is submitted that the onus is on the AO to hold that the said deposits are on account of undisclosed income of the appellant and this view is correct in view of the decision of the Supreme Court in the case of CIT v. Daulatram Rawatmal (supra).

(e) It is further submitted that as discussed by the AO himself in the orders of NKIL and NKPL, no cheque books were found from the residential premises of the appellant in respect of any of the above account holders relating to the abovementioned concerns. This is found to be correct since the same were found from the residence of Kamleshbhai Patel. As such, addition made by the AO of Rs. 37,19,85,062 cannot be sustained and therefore directed to be deleted."

89. The CIT(A) gave the following findings in relation to this ground raised in the Revenue's appeal in the case of NKPL in para 7.4 on pp. 23 and 24 of his order:

"7.4 I have considered the submissions made and also perused the facts. It is noted that the AO has treated the total of deposits appearing in the bank accounts of the said 5 parties pointed out by the appellant in para 3.2 of the submissions. It is submitted that purchases from the appellant recorded only for Rs. 11.99 crores and the rest is from the outside parties for which no findings have been given by the AO. In respect of the amount of Rs. 3,64,01,316, no finding has been given by the AO and the transaction has already been considered in the case of NKIL. It is noted that the contention of the appellant are correct and the appeal of NKIL bearing Appeal No. CIT(A)-VI (now III)/CC2/54/01-02 has already been disposed of as per order dt. 16th Jan., 2002. After perusing the points made by the appellant, I find that

there is no justification in making double addition first by way of treating the same as bogus purchases and than considering the same as unexplained deposits in the bank accounts of the proprietors/concerns. It is relevant to note that it is observed by the AO that withdrawals made relating to purchases of NKPL have been used by the appellant itself.

7.5 In view of the above facts, I do not see any justification in making further addition on the basis of deposits in the said accounts without any basis. The addition made on this account on protective basis, therefore, cannot be sustained and directed to be deleted."

90. The CIT(A) in the case of NKIL has considered this issue in para 6 to 6.2 on pp. 12 to 14 of his order as under:

"6. This relates to addition of Rs. 5,71,71,630 in respect of deposits in the bank account of the said suppliers and Rs. 91,47,866 on account of undisclosed deposits in the said bank account. This has been discussed and referred by the appellant in para 2.2 of its written submissions reproduced above. The said additions have been made on protective basis. It is pleaded by the appellant in the written submissions as per para 10 as under:

"10, Unaccounted payment of Rs. 5.71 crores (para 13page No. 38 and 39):

10.1 The learned AO has made addition of Rs. 5.71 crores as unaccounted payments.

10.2 The assessee made purchases which is considered as bogus and the assessee also made payment for such purchases by cheques. The learned AO obtained bank statement of the said suppliers and the total deposits made in the said accounts by the assessee-company and outsiders are considered as payment made by the assessee-company and is also considered as unaccounted payments. Therefore, the learned AO has made addition of Rs. 5.71 crores as unaccounted payments on protective basis. The details of such unaccounted payments and purchases are given below:

Purchases considered as bogus in the case of NKIL:

	Rs.
Somnath Industries	1,14,78,000
Krishna Marketing	51,67,228
Sejal Enterprises	1,26,48,060
	2,92,93,288

The details of deposit of cheques in the bank account from the above referred companies and outsiders are as under:

...

...

10.3 From the above, it may please be seen that the total deposits from the accounts is Rs. 5.71 crores whereas the total purchases from the three concerns are Rs. 2.92 crores. In other words, the said concerns are also dealing with outsiders which proves that the said concerns are not benamidar. Even the payment by the outsiders are considered payment made by the company without any basis and evidences. Further, the payment for purchases is by cheques and they are reflected in the accounts regularly maintained by the company and, therefore, such payment for purchases is accounted payment and cannot be considered as unaccounted payments.

10.4 Even if it is considered as unaccounted payment, the addition is already made for purchases and, therefore, there is no question of making for further addition for unaccounted payments, if so made, it is double addition.

10.5 The protective assessment is normally made, if the Department is in doubt about the person in whose hands the income is taxable. The learned AO has also stated that the inquiries would be made in the hands of the said suppliers and, therefore, the substantive addition would be made in the hands of the suppliers. Now, the said concerns are treated as benamidar and the deposits in the

accounts of suppliers of NKIL and NKPL is treated as undisclosed income in the case of Nilesh K. Patel and therefore, the question of treating any such payments as unaccounted in the case of NKIL even on protective basis does not arise."

6.1 Similarly, in respect of addition of Rs. 91.47 lakhs, it has been submitted as under as per para 11 of the written submissions as under:

11. Unaccounted deposit of Rs. 91.47 lakhs (para 13 page No. 39) :

11.1 The learned AO has made addition of Rs. 91.47 lakhs as unexplained deposit since it is argued that the company has made such deposits in the account of Sejal Enterprises. In other words, Sejal Enterprises is treated as benamidar of NKIL. There is no evidence whatsoever adduced by the learned AO for holding Sejal Enterprises as benamidar of the company. In fact, the company has made deposit since it is argued that the company has made such deposits in the account of Sejal Enterprises.

11.2 In other words, Sejal Enterprises is treated as benamidar of NKIL. There is no evidence whatsoever adduced by the learned AO for holding Sejal Enterprises as benamidar of the company. In fact, the company has made purchases from Sejal Enterprises to the extent of Rs. 1,26,48,060 and such purchases are considered as bogus and the addition is already made in the case of NKIL which is being contested. Therefore, the question of making any addition as unexplained deposit in the case of assessee-company does not arise."

6.2 I have carefully considered the same and in view of my findings given in respect of Krishna Marketing and Somnath Industries, there is no justification for treating the same as income of the appellant in the block assessment. In respect of the addition of Rs. 91,47,866, addition of Rs. 1,26,48,060 has already been confirmed and there is no basis for making further addition in the absence of any additional evidence that the same is co-related with purchases out of unexplained monies. This would amount to double taxation. In view of the above facts, these 2 additions are directed to be deleted."

91. The learned Senior Departmental Representative relied upon the reasons mentioned in the assessment orders. The Bench persistently required the learned Senior Departmental Representative to furnish the details of inquiries made subsequent to the completion of these assessments, as indicated in the assessment order of NKIL and NKPL that inquiries will be made as to which other concerns have given cheques to these billing agents/name lenders which have been deposited in their bank accounts and additions on substantive basis will be made after completing those inquiries in the cases of such other concerns who gave those cheques. The learned Senior Departmental Representative submitted a letter dt. 18th Dec., 2002. The relevant extracts of the said letter are reproduced as below:

"As directed during the course of hearing by your honour, I am submitting herewith details of bank enquiries carried out in the group cases of N.K. concerns. It is submitted that there are large number of cheques and banks are involved due to which enquiries have not conducted yet. There are practical difficulties also due to which enquiries have not reached its conclusion. Kindly see the page No. 6 of the enclosure which is the reply from the Mehsana Urban Co-op. Bank Ltd. The bank has submitted as follows:

"You are requested to note that we present all our bank clearing in computerised floppy and maintain our all records in computers. You are requested to note that we have the record of the name of the branch through which the instruments were presented by our bank. Moreover, all original instruments are presented to the concerned branch of the bank. Therefore it is not possible to furnish the data as per your requirements."

2. Page No. 40 to 49 all the details furnished by the Mehsana Urban Co-op. Bank Ltd. In the details filed by the bank, the cheque number and name of the bank mentioned. They have not mentioned the branch of the bank. Kindly see the page No. 39 wherein the reply the bank has written that we don't have records of the bank branch from which these instruments were presented. Kindly see the page No. 1 in which Co-operative Bank of Ahmedabad Ltd. has stated that the cheque No. 44156 as

mentioned is not clear from this branch and so we are unable to furnish further details as required by you. The Kalupur Commercial Co-op. Bank Ltd. has stated as appeared at page No. 4 that furnish the name of the company under N.K. group and the date of clearance of cheque. On page No. 50, the Sabarmati Co-op. Bank Ltd. has stated due to shifting process our records related to our branch we are unable to submit all such data in time.

3. Kindly see the page No. 20 of which the bank has given a/c No. 4002, this bank a/c is in the name of Swastik Overseas Ltd. From the bank a/c opening found which is on page No. 37, it is seen that this a/c is introduced by N.K. Industries Ltd. Kindly see page No. 34 which is the account opening form of Issan Overseas Ltd. This account is also introduced by N.K. Industries Ltd.

4. Kindly see the page No. 38 in which the Mehsana Urban Co-op. Bank Ltd. has stated that as per statement of a/c of Adinath Corporation a/c No. 531 of credit entries by transfer in the period from 17th April, 1998 to 7th July, 1998 from N.K. Proteins Ltd. Ahmedabad."

92. The various correspondence exchanged by the AO with the concerned banks are only upto May, 2001, The learned Senior Departmental Representative submitted that in view of the difficulties indicated in the aforesaid letters, it has not been possible to conduct further enquiries. In reply to a specific query from the Bench, the learned Senior Departmental Representative candidly admitted that no further enquiries were made after May, 2001. The Department has also not produced any evidence to show that they conducted any further investigation to find out as to which other parties have given cheques to these bogus suppliers in whose bank accounts such cheques aggregating to several crores of rupees have been deposited.

Our attention has been invited towards bank account opening form in respect of account No. 4002 in the name of Swastik Overseas Ltd. placed at p. 37 of the documents submitted along with the letter dt. 18th Dec., 2002. This account was introduced by N.K. Industries. The persons authorised to operate the bank account in the name of Swastik Overseas Ltd. is Shri R.B. Mehta and one other

Mehta. The learned Senior Departmental Representative was requested to show the photo copy of the statement of Rajesh Mehta-broker with a view to find out whether the signature on this bank account opening form tallies with the signature of the said broker. It was found that signature on this bank account opening form appears to be of the same person viz. Shri Rajesh Mehta-broker. The Bench required the learned Senior Departmental Representative to state as to whether Shri Rajesh Mehta-broker has been interrogated in relation to transactions carried out in the name of Swastik Overseas Ltd. The learned Senior Departmental Representative admitted that no such interrogation of Shri Rajesh Mehta was made. The extracts from the statement of Shri Rajesh Mehta reproduced on p. 10 of the assessment order in the case of NKPL shows that not a single question was put by the AO or Addl. DIT to Shri Rajesh Mehta about Swastik Overseas Ltd.

93. Likewise, the learned Senior Departmental Representative has also drawn our attention to the bank account opening form of Issan Overseas Ltd. placed at p. 34 of the said paper book. One of the persons authorised to operate the bank account on behalf of Issan Overseas Ltd. is Shri Rajesh Mehta, the same person who claimed to have acted as broker on behalf of the assessee. Not a single question was put to Shri Rajesh Mehta-broker in the said statement reproduced at p. 10 of the assessment order in the case of NKPL and at p. 9 of the assessment order in the case of NKIL. There is no discussion about any transaction carried out by the assessee with Swastik Overseas Ltd. and Issan Overseas Ltd. in the assessment order. Copy of bank account of Tirupati Corporation submitted at p. 20 of the said submissions by the Department shows that the cheques given by M/s Swastik Overseas and Issan Overseas were also deposited in the bank account of Tirupati Corporation. No evidence has been brought on record to show that Swastik Overseas and Issan Overseas were benamidars of the assessee or cheques given by Swastik/Issan Overseas came out of the funds belonging to the persons or concerns of NK group. These cheques of Swastik/Issan Overseas constitute a small figure of about Rs. 10 lakhs which is a small fraction of the total deposits aggregating to more than Rs. 44 crores deposited in the bank accounts of such bogus

suppliers/name lenders/billing agents. The Department has not even examined the partners/proprietors/directors of Swastik Overseas Ltd. and Issan Overseas Ltd. The Department has not made any serious efforts to find out the complete names, addresses of various other concerns which gave cheques to all these bogus suppliers, which have been credited in their respective bank accounts. The concerned IT authorities having vast powers vested upon them under the provisions of the Act could very easily obtain complete details of all the persons who gave these cheques to these bogus suppliers. They could also find out various withdrawals made from these bank accounts of various bogus suppliers and ascertain the destination of those amounts withdrawn by various cheques other than self cheques debited in those bank accounts. No serious efforts have been made for finding out the complete particulars of various debits and credits in the bank accounts of all such bogus suppliers except locating details of cheques given by NKPL and NKIL as per books of accounts of these two concerns. The learned Senior Departmental Representative simply relied upon the reasons mentioned in the assessment orders to support such a ground raised in all the aforesaid three appeals by the Revenue; one in the case of NKPL; NKIL and Shri Nileshbhai K. Patel. The learned Senior Departmental Representative also drew our attention to letter dt. 23rd May, 2001 sent by Madhavpura Mercantile Co-op. Bank Ltd. to the AO informing them that cheque No. 162824 and 162854 were issued by M/s Madhukant Agrotech (P) Ltd. in favour of Karnavati Industries. Copy of current account card was also annexed with this letter which shows details of a/c No. 362 in the name of M/s Madhukant Agrotech (P) Ltd. The address of M/s Madhukant Agrotech (P) Ltd. as given in the account opening form is as under:

Madhukant Agrotech (P) Ltd.

Aarohi, Nr Vijay Restaurant, University Road, Navrangpura, Ahmedabad.

94. The persons authorised to operate the said bank account are Shri Kiritbhai K. Shah and Shri Maulik K, Shah. The account was introduced by Giriraj Trading Co., Girishkumar K. Shah-HUF. Copy of resolution passed for

opening of the said bank account by Madhukant Agrotech (P) Ltd. was also supplied by the said bankers to the AO. The Bench required the learned Senior Departmental Representative to state as to whether any further investigation was made from M/s Madhukant Agrotech (P) Ltd. to show as to whether they had any direct or indirect connection with any of the persons or concerns of N.K. Group. The learned Senior Departmental Representative admitted that no further enquiries were made from Madhukant Agrotech (P) Ltd. The learned Senior Departmental Representative also tried to explain that the bankers have indicated that they did not have the records of bank branches from which various instruments relating to such bank accounts were presented. For example, attention was invited towards letter dt. 20th March, 2001 of Mehsana Urban Co-op. Bank Ltd. p. 39 of this paper book in which they have indicated that the AO should contact service branch/head office of respective banks for the required details. However all these inquiries continued only upto May, 2001. The assessment in the case of NKPL and NKIL were made on 30th April, 2001. The assessment in the case of Nileshbhai Patel was completed on 28th Feb., 2001. No effective efforts were made by the officers of the Department for further investigation in this regard. The AO on p. 35 in the case of NKPL and on p. 39 of the assessment order in the case of NKIL has observed that the inquiries are being conducted from the banks to find out the names and particulars of other, concerns which made these payments for purchases and other expenses. Substantive disallowances will be made in the cases of those concerns after conclusion of enquiries. The additions were protectively made in the cases of NKIL and NKPL subject to further investigation so that appropriate additions can be made in the hands of the concerns who gave such cheques to these bogus suppliers. However, no further inquiries have been made and no additions have been made in the cases of any such other concerns who really gave cheques to these bogus suppliers.

95. The learned counsel appearing for the assessee submitted that the results of search conducted on all the persons and concerns belonging to this group show that no unaccounted money, bullion, jewellery, stock or any other valuable assets were found from any of the persons

or concerns except meagre quantity of jewellery and cash etc. The unexplained jewellery was disclosed by the assessees of this group in the block return which have been accepted by the Department, The addition made on account of unexplained cash in the hands of different persons of this group was made by the AO but same was deleted by the CIT(A) and no further appeal has been preferred by the Revenue in relation to such deletion. This clearly proves that the assessee, did not own any other unaccounted assets or deposits whatsoever. The learned counsel contended that no addition could be validly made in the hands of Shri Nilesh K. Patel as he was not carrying on any personal business. The entire evidence which contains reference of his name is in his capacity as MD/director in NKPL and NKIL. There is no material or evidence on record that any funds were provided by Shri Nileshbhai Patel for deposits in all or any of these bank accounts. Shri Nileshbhai Patel had no transactions with any of these suppliers. Mere introduction of some bank accounts cannot lead to the conclusion that the assessee were the real owners of the amounts credited in the bank accounts of such suppliers particularly when all such credits in the bank accounts of those suppliers are by way of cheques deposited in these accounts. Such cheques other than cheques given by NKPL and NKIL towards purchase invoices were given by outside parties/third parties with whom neither Shri Nileshbhai Patel, nor NKPL nor NKIL had any connection whatsoever. The burden squarely lies upon the Revenue to prove that such cheques were deposited by these assessees. The learned counsel relied upon the judgment of the Hon'ble Supreme Court in the case of CIT v. Daulatram Rawatmal (supra); and the decision of Tribunal in the case of Parakh Foods Ltd. v. Dy. CIT (supra) and various other decisions referred to in para 4.7 of the order of CIT(A) in the case of Shri Nileshbhai Patel. The learned counsel further pointed out that no notice under Section 158BD had been issued to any other concerns who gave such cheques to these suppliers. Reliance was also placed on the decision in the case reported in 68 ITD 273 (sic). The learned counsel contended that the documents submitted along with letter dt. 18th Dec., 2002 by the learned Senior Departmental Representative further supports the assessee's contention. For example, cheques of Madhukant Agrotech (P) Ltd. were credited in the bank account of Karnavati Industries.

M/s Madhukant Agrotech have no connection whatsoever with the assessee. This strongly supports the view that Karnavati Industries, if they are treated as bogus suppliers/billing agents/name lenders, they are acting as such on behalf of other parties. Similar inference can be drawn from the bank opening forms of Swastik Overseas Ltd. and Issan Overseas Ltd. The Department ought to have examined Shri Rajesh B. Mehta and other directors/owners of those concerns to find out as to who were real persons who gave such cheques to these bogus suppliers. The learned counsel drew our attention to the copies of bank statements submitted by the learned Senior Departmental Representative along with the letter dt. 18th Dec., 2002. In those bank statements the bankers appear to have given hand-written narration such as KCC, PNB, Manekchowk, AMCO etc. The assessee had no bank account with PNB, KCC or any of these places which are hand written and which have been highlighted in the copies of those bank statements submitted by the learned Senior Departmental Representative. The Department has miserably failed to bring any evidence on record to show that any of the cheques of outside parties/third parties were in any way connected with any of the persons or concerns of N.K. Group. The learned counsel strongly supported the orders of the CIT(A) in all these three cases in relation to the aforesaid common ground.

96. We have carefully considered the submissions made by the learned representatives of the parties and have gone through the orders of the learned Departmental authorities and all other documents submitted in the compilation to which our attention was drawn during the hearing. It is evident from the facts discussed hereinbefore that the addition in respect of unexplained deposits in the bank accounts of various suppliers were made in the cases of NKPL and NKIL on protective basis with the observation that further inquiries will be made from various branches of banks to ascertain that which other concerns have given such cheques which have been deposited in the bank accounts of these bogus suppliers. It is also clear from the facts discussed above that the Department did not make any serious efforts to make effective investigation or deep further probe in this regard after completion of the assessments on 30th April, 2001. Some letters were sent to the bankers in the month of

March to May, 2001 and thereafter the matter was not pursued.

97. The deposits in the bank accounts of these bogus suppliers can be validly added in the hands of any of these assessees only if the Department discharges the burden of proving that these suppliers were benamidars of any one of these three assessees of N.K. Group and the Department has to further discharge the burden of proof that the deposits in these bank accounts by way of cheques were made out of funds provided by these persons or concerns of N.K. Group. Such a burden has to be discharged by the Revenue by bringing positive and clinching evidence on record. No such evidence has been brought on record by the Department to prove that the cheques of third parties deposited in the bank accounts of these suppliers were out of funds provided by any of these three assessees. In order to prove that the bank accounts in the names of these suppliers are benami accounts or that the suppliers are benamidar persons/concerns, the following tests are very vital and significant:

(i) Who provided the funds for deposit

(ii) Who enjoyed these funds

(iii) What is ultimate destination of these funds.

98. The Department has to prove by bringing on record definite, positive and clinching evidence on all these three aspects to support their conclusion that these bank accounts are benami accounts and deposits in these bank accounts in the names of suppliers really belong to NKPL or NKIL or Shri Nileshbhai Patel and they were the persons who enjoyed these funds and the entire funds have directly or indirectly flown back in their favour. The degree of proof for proving the concept of benami bank accounts/benami persons is very stronger and that has to be discharged by bringing positive material on record. Such conclusion cannot be derived on the basis of mere suspicion and surmises. It may be relevant here to repeat once again that so far as purchases claimed to have been made by NKPL and NKIL from these concerns are concerned, the burden was on the assessees to prove genuineness of purchases but the same principle would not apply when the Department wants to treat the entire

deposits in these bank accounts in the names of various suppliers as benami deposits/benami accounts of these assessees. The Hon'ble Supreme Court in the case of Daulatram Rawatmal (supra) has observed at p. 360 as under:

"The onus to prove that the apparent is not the real is on the party who claims it to be so. As it was the Department which claimed that the amount of fixed deposit receipt belonged to the respondent-firm even though the receipt had been issued in the name of Biswanath, the burden lay on the Department to prove that the respondent was the owner of the amount despite the fact that the receipt was in the name of Biswanath. A simple way of discharging the onus and resolving the controversy was to trace the source and origin of the amount and find out its ultimate destination. So far as the source is concerned, there is no material on the record to show that the amount came from the coffers of the respondent-firm or that it was tendered in Burrabazar Calcutta Branch of the Central Bank, on 15th Nov., 1944, on behalf of the respondent. As regards the destination of the amount, it has already been mentioned that there is nothing to show that it went to the coffers of the respondent. On the contrary, there is positive evidence that the amount was received by Biswanath on 22nd Jan., 1946. It would thus follow that both as regards the source as well as the destination of the amount, the material on the record gives no support to the claim of the Department."

99. In the present case the Department has not even found out the names of the concerns/parties who gave cheques to these bogus suppliers aggregating to Rs. 21,89,82,084 upto the date of search and further amount deposited in their bank account even after the date of search upto the time when Dy. DIT/Addl. DIT had obtained copies of bank accounts of these suppliers from respective banks. It will be worthwhile to repeat that as per chart given in para 86 total deposits in the bank accounts of those bogus suppliers as per show-cause notice dt. 18th Jan., 2001 issued by the AO to Shri Nileshbhai Patel, was Rs. 44,43,05,403 out of which the total deposits in their bank accounts upto the date of search was only Rs. 37,19,85,062. Out of this, the payment made by NKIL and NKPL towards purchase invoices supplied by these bogus

suppliers were to the tune of Rs: 14,82,49,194. In addition to this, a cheque of Rs. 3,64,01,316 was given by Triveni towards goods sold by NKPL. This left the balance deposit aggregating to Rs. 21,89,82,084 received by bogus suppliers/billing agents from other parties/third parties with which it is contended that the persons or concerns of NX Group had no connection whatsoever. The names and particulars of parties who deposited the cheques in the bank accounts of these suppliers after the search have also not been brought on record, It was primary duty of the Department to find out as to which other parties/concerns have given these cheques which have been deposited in the bank accounts of these bogus parties. The Department has completely failed to discharge such burden, which heavily lies on them to support their conclusion that any of these three assessees were real owners of cheques of all such other concerns/third parties deposited in the bank accounts of these bogus suppliers. The Department has also not made any investigation to prove destination of the funds withdrawn by self cheques and by other cheques given to other parties. The Department has thus failed to discharge the burden of proving that the origin and destination of these funds were these assessees and none else. The CIT(A), in our view, has rightly deleted the additions so made by the AO in all these three cases under consideration.

100. We will, however, like to observe that the officers of the Department cannot leave the investigation of such an important matter in a lamentable and incomplete position like this. The Department has vast powers under Section 131(1A) or Section 133 and other relevant provisions by which they can compell the concerned banks to give them complete details of the concerns/persons whose cheques have been deposited in the bank accounts of all these bogus suppliers/billing agents/name lenders. The Department can also find out the details of amounts withdrawn from these bank accounts of bogus suppliers otherwise than by way of self cheques. The names and addresses of the parties to whom such cheques/demand drafts have been given can be obtained from the respective branch of the concerned banks. The Department can also obtain photo copies of self cheques by which the names of the persons who have withdrawn such cash can be found out by interrogation of concerned

persons including bogus suppliers/concerned employees of the banks and concerned employees of the concerns of assessee group and other concerns who gave such cheques. The total deposits in the bank account of these bogus suppliers/billing agents/name lenders is more than Rs. 44 crores. The Department has only found out the details of cheques given by NKIL and NKPL which is only a small portion thereof. The details of major credits in all these accounts have not yet been found out by the Department. It is incumbent on the part of the Department to find out complete details of all other concerns who gave such cheques to these bogus suppliers. Those other concerns might also have taken fictitious purchase invoices from these bogus suppliers. They may not have even received the material sought to have been supplied to those other concerns through such fictitious invoices issued by such billing agents. After carrying out necessary investigation and finding out the names and addresses of other persons and concerns, whose cheques have been credited in the bank accounts of these bogus suppliers, necessary action against those concerns/persons should be initiated under Section 158BD or under Section 147 or any other relevant provisions of the IT Act. The Department cannot exonerate such "other concerns" by leaving investigation at incomplete stage like this. It would be imperative to mention that the time limit for initiating action under Section 147has been reduced to only six years in Section 149. The time left with the officers of the Department now is very short. It is, therefore, necessary to strive the best possible time-bound programme for ascertaining the full particulars viz. names and addresses of all other concerns/parties/persons whose cheques have been deposited in the bank accounts of these bogus suppliers, so that timely action can be initiated against all such other persons/concerns/parties. If, as a result of further investigation, it comes to the notice of the Department that those other concerns/third parties are benamis of the persons and concerns of assessee's group, the Department will be entitled to take necessary action under Section 147, if they have in their possession adequate material to justify formation of reasonable belief which should be much more stronger than the reasons to suspect, If the AO comes across evidence and material which were not found or made available in the process of

block assessment but are discovered as a result of post-search investigation, he can certainly use such information for making regular assessment under Section 143(3) which also includes reassessment under Section 147 subject to fulfilment of conditions precedent mentioned in the other provisions of the Act. It will be the duty of the learned Senior Departmental Representative who represented this case before us to bring this fact to the notice of the learned Chief CIT, learned CIT, and learned DG (Investigation) so that further investigation in this regard may receive serious attention, which it deserves, and timely action can be initiated against such other concerns/persons under Sections 147, 158BD or other relevant provisions.

101. Now we will deal with Ground No. (2) in Revenue's appeal in the case of NKPL [IT (SS) A No. 41/A/2002]. This ground relates to deletion of addition of Rs. 2,01,99,792 made on account of unaccounted purchase. As already stated hereinbefore, this addition was made on the basis of invoices found in Annex. A-6 during the search. Certain sale bills issued by NKIL in respect of sales made to NKPL were found and seized during the search. These invoices were not accounted for in the books of accounts of the assessee as well in the books of NKIL. We have already dealt with this issue while dealing with the connected ground raised in this regard in assessee's appeal. After consideration of the entire relevant facts, we consider it just and proper to set aside the orders of the CIT(A) and the AO in relation to this ground and restore the matter back to the AO for conducting further probe and decide this issue in accordance with the provisions of law and after providing reasonable opportunity to the assessee.

IT (SS) A No. 16/Ahd/2002 filed by assessee in the case of NKIL:

102. Now we will deal with assessee's appeal in the case of NKIL in IT (SS) A No. 16/Ahd/2002. The assessee has raised the following grounds in this appeal:

1. The learned CIT(A) has erred in rejecting the contention that block assessment is void ab initio since the notice issued under Section 158BC does not mention the status of

the assessee and does not mention correct block period and therefore the notice issued is invalid.

2.1 The learned CIT(A) has erred in holding that the purchases made from Sejal Enterprises amounting to Rs. 2,50,427 for asst. yr. 1995-96, Rs. 62,75,837 for asst. yr. 1998-99 and Rs. 61,21,796 for asst. yr. 1999-2000 amounting in all to Rs. 1,26,48,060 are bogus and thereby has erred in confirming addition of Rs. 1,26,48,060 as undisclosed income.

2.2 The appellant says and submits that the purchases of Rs. 2,50,427 for asst. yr. 1995-96 and Rs. 62,75,835 for asst. yr. 1998-99 is recorded in the books of accounts and that the income-tax return for asst. yr. 1995-96 and asst. yr. 1998-99 were submitted prior to the date of search and purchases of Rs. 61,21,796 for asst. yr. 1999-2000 have been recorded in the normal manner in books of accounts prior to the date of search i.e. 24th Feb., 1999 and, therefore, such transactions are not considered as undisclosed income as provided in Section 158BA(3).

2.3 The appellant further says and submits that the learned CIT(A) has erred in placing reliance on finding based on inquiry made by Addl. DPT under Section 131(1A) and that the learned Dy. CIT has not made any independent inquiry and therefore, the addition made on the basis of inquiry made by learned Addl. DIT under Section 131(1A) is illegal and not warranted since the learned Addl. DIT also cannot make inquiry under Section 131(1A) after the conclusion of search.

2.4 The learned CIT(A) has erred in confirming the finding of the Dy. CIT as stated on from page No. 6 to 16 of the assessment order which is nothing but reproduction of appraisal report and that the AO has not made any independent inquiry whatsoever. The AO has relied only on the finding given by the Addl. DIT and that the AO has also not examined the supplier.

2.5 The appellant further says and submits that the learned Addl. DIT has obtained affidavit from the proprietor of Sejal Enterprises behind the back of the assessee and that the learned Dy. CIT has placed the reliance on such affidavit.

2.6 The appellant further says and submits that the affidavit obtained by the learned Addl. DIT is similar in contents with the affidavits and statements obtained in the case of N.K. Proteins Ltd. and therefore, it appears that such affidavit is obtained under undue influence, therefore, any finding based on such affidavit cannot be relied upon.

2.7 The appellant further says and submits that the learned Dy. CIT ought to have summoned the said persons and should have found out the truth and that the opportunity to cross-examine the said persons should have been given.

2.8 The appellant further says and submits that the assessee-company has in fact, made purchases and has furnished the evidences at the time of assessment by giving the details such as date of inward, quantity received, MRS No., report No. along with the xerox copy of purchase bill, weighment slip, material inward receipt, transporter's LR, analysis report with reference to inward and stock register and that the assessee has also stated that if the purchases are ignored the production is more than the consumption of raw material. The appellant submits that the CIT(A) called for the remand report and the AO submitted remand report dt. 26th Dec., 2001 confirming the receipt of material and the consumption thereof and about the yield. However, the learned CIT(A) has ignored the facts of the material received and ignored the remand report and submissions of the assessee.

2.9 The appellant further says and submits that the purchases were at the market rate which is confirmed by the learned Dy. CIT in the remand report dt. 26th Dec., 2001 and therefore, it is clear that the purchases were not made to deflate the profit.

2.10 The appellant further says and submits that the assessee-company has made the payment of the entire purchases by cheques to the suppliers which is not disputed.

3. The learned CIT(A) has erred in placing reliance on finding given by Addl. DIT in his appraisal report and has erred in ignoring the other submissions regarding factum

of purchases and regarding the recording of purchases in the books of accounts in the normal manner.

4.1 The learned CIT(A) has erred in confirming the addition of Rs. 2,01,99,793 being alleged sales made by the company inasmuch as the transaction have never taken place.

4.2 The appellant further says and submits that, alternatively, only profit of the sales amount can be taxed and not the entire gross amount.

5.1 The learned CIT(A) has erred in confirming the addition to the extent of Rs. 19 lakhs as unaccounted deposit with Pari L T Shroff inasmuch as no evidences were adduced by the learned Dy. CIT as undisclosed income of the appellant.

5.2 The appellant further says and submits that the disclosure under VDIS Scheme was made by the appellant on the basis of the notice issued by the Department. Now, Department cannot change the stand and is permitted to state that the amount was more than disclosed under VDIS Scheme.

6.1 The order of block assessment is bad in law and illegal inasmuch as the approval of Jt, CIT is granted under Section 158BG without giving any opportunity to the assessee of being heard. The power to grant approval is quasi-judicial and not administrative and therefore, there has to be a judicial approach on entire facts, material and evidence (Kirtilal Kalidas & Co. (1999) 64 TTJ (Mad) 77 : (1998) 67 ITD 573 (Mad). The Jt. CIT has a supervisory role and therefore, approval granted is administrative in nature in the normal course but in block assessment in Chapter XIV-B a specific provision is made under Section 158BG for granting approval. It means that the power is quasi-judicial and not of administrative nature.

6.2 The appellant says and submits that the approval granted by the Jt. CIT appears to be mechanical without application of mind inasmuch as the approval is granted on 30th April, 2001, i.e., date of passing of the order and the date of service of the order.

7. The interest under Section 158BFA(1) is wrongly charged.

8. The proceedings under Section 271(1)(c) r/w Section 158BFA(2) is wrongly initiated.

103. Ground No. 1 raised in this appeal is similar to ground No. 1 raised in the appeal of NKPL. The facts are similar. In view of the reasons given in our order in the case of NKPL in relation to this ground, we hold that this ground is devoid of any merit and is accordingly rejected.

104. Ground No. 2 relates to confirmation of addition of bogus purchases made from Sejal Enterprises amounting to Rs. 2,50,427 for asst. yr. 1995-96, Rs. 62,75,837 for asst. yr. 1998-99 and Rs. 61,21,796 for asst, yr. 1999-2000 amounting in all to Rs. 1,26,48,060. Ground Nos. 2.1 to 2.10 and Ground No. 3 relating to the aforesaid additions of Rs. 1,26,48,060 made in respect of bogus purchases are almost similar as raised in Ground Nos. 2.1 to 2.10 and Ground No. 3, in the case of NKPL relating to addition of Rs. 11.99 crores made in respect of bogus purchases in that case.

105. The Revenue has raised the ground relating to deletion of the disallowance of Rs. 1,66,45,228 made by the AO on account of bogus purchases. It will be appropriate to deal with Ground Nos. 2 and 3 of assessee's appeal along with Ground No. 1 of appeal filed by the Revenue in the case of NKIL (IT (SS) A No. 38/Ahd/2002), all of which deal with the issue relating to bogus purchases made from bogus suppliers. The AO made an addition of Rs. 2,92,93,288 in respect of purchases made from the following three alleged bogus suppliers :

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106. The AO has discussed the facts relating to these bogus concerns in para 6 on pp. 6 to 16 of the assessment order. The facts pertaining to purchases made from Somnath Industries have been discussed on pp. 7 to 9 of the assessment order. The AO has observed that during the investigation, it was found that NKIL has shown

purchases, inter alia, from Somnath Industries. The results of investigation revealed that this concern was owned by one Shri K.R. Soni. He was summoned under Section 131(1A) and his statement was recorded on 7th June, 1999. The relevant portion of his statement has been extracted on pp. 7 and 8 of the assessment order. Shri K.R. Soni has categorically denied having supplied any such material. He admitted that he was signing bill books, blank cheque books, application for registration of sales-tax in the name of Somnath Industries at the instance of Shri Nileshbhai Patel who used to give him Rs. 2000 p.m. for all this work. The bank account of Somnath Industries was opened on 24th Aug., 1998 with initial deposit of Rs. 1,000 in cash. It has been closed on 12th May, 1999. One more bank account of Somnath Industries was also opened. The total amount of deposit in these two bank accounts upto the date of search was Rs. 2,24,57,568 as mentioned on p. 9 of the assessment order. The AO has also observed that in almost all cases, the deposits and withdrawals are on the same day. The AO on the basis of aforesaid evidence gave similar findings that Somnath Industries is fictitious entity and purchases shown by NKIL from them represented bogus purchases. The findings so given are recorded on p. 9 of the assessment order.

107. The facts relating to Krishna Marketing have been discussed on pp. 9 and 10 of the assessment order. They opened their bank account on 18th June, 1998 with Sabarmati Co-op. Bank Ltd. on 18th June, 1998 with initial deposit of Rs. 1,100, The proprietor of this concern is Shri Rajesh P. Doshi. The nature of this bank account is exactly similar to the other bank accounts of other alleged bogus suppliers. The address given by Shri R.P. Doshi to the bank was also fictitious. Shri R.P. Doshi filed an affidavit before the IT authorities in which it was stated by him that the whole business is controlled by Shri Nileshbhai Patel who is the main person handling all the day-to-day activities of the assessee-company. The AO arrived at similar conclusion in relation to purchases shown to have been made by NKIL from this fictitious entity.

108. The facts relating to Sejal Enterprises have been discussed by the AO on pp. 10 and 11 of the assessment

order. The summons were issued to proprietor of Sejal Enterprises on the address given to the bank but those were returned back as the party was not available at the given address. The AO observed that the facts in the case of Sejal Enterprises are similar and he treated these purchases shown to have been made from Sejal Enterprises as also bogus purchases.

109. The AO thereafter gave a notice dt. 4th Dec., 2000 in which entire material gathered behind back of the assessee in relation to such bogus purchases was supplied and the assessee was required to explain as to why purchases made from these concerns should not be disallowed. The assessee filed reply dt. 15th Dec., 2000 stating that the entire purchases are recorded in the books of accounts in the normal course before the date of search and therefore it does not fall within the purview of block assessment. The AO has thereafter discussed the various show-cause notices given by him and the replies received from the assessee in this regard. The show-cause notices and the replies were also almost as that in the case of NKPL. The AO arrived at the conclusion that all such purchases made from these three parties are bogus purchases and he disallowed the total purchases of Rs. 2,92,93,288 made from them.

110. The learned CIT(A) has dealt with this issue in para 5 on pp. 4 to 11 of his order. The CIT(A) has observed in para 5.5 of his order that except 2 blank sale bills in respect of Sejal Enterprises appearing at Annex. A-88/2 and A/88/5, no other blank bill or voucher was found during the course of search. The CIT(A) asked the AO to verify this fact vide letter dt. 4th Jan., 2002. The AO in reply to the said letter submitted that no blank bills or cheques were found and seized in respect of M/s Somnath Industries and Krishna Marketing. The CIT(A) following the judgment of the Hon'ble Gujarat High Court in the case of N.R. Paper & Boards (supra) and also the fact that no statement under Section 132(4) during the search in respect of these purchases was recorded, he deleted the addition made by the AO in respect of purchases made from Somnath Industries and Krishna Marketing amounting to Rs. 1,14,78,000 and Rs. 51,67,228 respectively. The CIT(A) however confirmed the addition in respect of purchases of Rs. 1,26,48,060 made from Sejal

Enterprises. The CIT(A) has observed that two blank bills of Sejal Enterprises were found during the search. The AO issued summons at the address given on the said bills but the same were returned back. The entire deposits made in the bank account of this concern was by way of transfer entries from the appellant and moneys were immediately withdrawn from the said bank account. The CIT(A) also relied upon the judgment of the Hon'ble Delhi High Court in the case reported in CIT v. La Medica (2001) 250 ITR 575 (Del). The CIT(A) also observed that since no affidavit has been submitted in respect of Sejal Enterprises, the submissions made relating to affidavit of other parties are not relevant. It is also found from the orders of the AO and the CIT(A) that the assessee had, inter alia, submitted the affidavit of Shri Kaushik R. Surti, proprietor, M/s Somnath Industries. The AO has rejected the said affidavit as the signature thereon did not tally with the signature on his affidavit filed before the Dy. DIT.

111. The learned counsel made oral arguments and also submitted written arguments with the heading "notes". The submissions made by the learned counsel are almost similar as were made in the case of NKPL. Reliance has been placed on similar set of judgments in this case also. It has been argued that even if it is assumed that these concerns were bogus concerns, so far as the assessee is concerned, the material was actually received. The receipt of material is supported by seized records. This has also been confirmed by the AO in the remand report submitted before the CIT(A). On the strength of similar arguments as were made in the case of NKPL, the learned counsel contended that the addition of Rs. 1,26,48,060 in respect of purchases made from Sejal Enterprises should be deleted.

112. On the other hand, the learned senior Departmental Representative relied upon similar arguments and contended that all these three parties are bogus parties. They had no capacity to supply raw material of such large magnitude. The bank accounts were opened and operated in similar manner as in the case of NKPL.

113. During the course of hearing, the Bench specifically required the assessee to produce all these three parties along with their records. The learned counsel contended

that the assessee cannot produce them along with their records as they are not under the control of the assessee. The assessee has thus refused to produce these three suppliers along with their relevant records before the Tribunal inspite of specific opportunity granted to them.

114. We have carefully considered the submissions made by the learned representatives. In our view, the order passed by the learned CIT(A) deleting the addition of Rs. 1,14,78,000 and Rs. 51,67,228 in respect of purchases made from Somnath Industries and Krishna Marketing, is not justified, The CIT(A) relying upon the judgment of the Hon'ble Gujarat High Court in the case of N.R. Paper & Boards (supra) has agreed with the assessee's contention that so far as purchases from these two concerns are concerned, they cannot be considered in the block assessment under Chapter XIV-B for the block period because no documents relating to those two parties were found during the course of search. The judgment of the Hon'ble Gujarat High Court in the case of N.R. Paper & Boards has been read by the CIT(A) out of context. We have already discussed this issue while dealing with the similar grounds in the case of NKPL. The judgment of the Hon'ble Gujarat High Court in the case of N.R. Paper and Boards if read in the light of context and the question decided by the Hon'ble Gujarat High Court, it would be amply clear that the ratio of the Hon'ble Gujarat High Court laid down in those cases does not in any manner support the view so taken by the CIT(A). The basic facts that the concerns of N.K. Group viz. NKPL and NKIL are resorting to the device of obtaining fictitious purchase invoices from the bogus suppliers came to the knowledge of the authorised officers, Dy. DIT/Addl. DIT as a result of search. The result of search clearly demonstrated that the assesses is claiming deduction in respect of inflated purchases, by debiting bogus purchases or may be by inflating the purchase price by obtaining the purchase invoices from name lenders/billing agents. It may also be relevant here to once again refer to the amended definition "undisclosed income" given in Section 158B(b) which, inter aha, includes any expenses, deduction or allowance claimed under this Act, which is found to be false. This detection of falsity of purchases made from all these parties was made by the Department only as a result of search. If search would not have been

conducted, the Department would have never come to know of such a device adopted by the assessee. We are therefore of the considered opinion that the order passed by the CIT(A) of deleting such additions is not valid and justified on the facts of the present case. Various other facts and circumstances relating to all the three parties viz. Somnath Industries, Krishna Marketing and Sejal Enterprises are similar as that in the case of NKPL in relation to purchases of Rs. 11.99 crores made by them from various such bogus suppliers. The facts and circumstances are absolutely similar.

115. In view of the aforesaid facts and circumstances, we hold that all the three parties from whom the assessee claimed to have purchased material to the tune of Rs. 2.92 crores are merely name lenders/billing agents and the sale invoices issued by them in the name of NKIL are fictitious invoices. The burden lies on the assessee to support any claim for deduction made by them. In the present case such burden should have been discharged by the assessee only by producing those three suppliers along with their records so that the genuineness of their purchases, sales, financial capacity and all other relevant facts could be examined. The assessee has not produced them before the AO. We gave a specific opportunity to the assessee to produce all of them before the Tribunal along with their records. The assessee has expressed their inability to produce them before the Tribunal. However, it is also true that the receipt of material shown to have been purchased from these three parties had really been received as per facts and evidence brought on record, which are similar as in the case of NKPL.

116. It may also be relevant here to mention that the Bench required the learned Senior Departmental Representative to submit a peak statement in relation to the amounts of these three parties. The learned Senior Departmental Representative submitted copies of those statements which show that the transactions in the accounts of Somnath Industries cover the period from 26th Aug., 1998 to 1st Jan., 1999. The peak credit in these accounts as on

27th Sept., 1998 was Rs. 47,33,270. The peak credits in the accounts of Krishna Marketing covers period from 27th Aug., 1998 to 22nd Sept., 1998. The peak credit in this account as on 10th Sept., 1998 was Rs. 33,26,780, the entries in the account of Sejal Enterprises covers the period from 19th Dec., 1997 to 13th Nov., 1998 in the aforesaid peak statement submitted by the Department. The peak balance in this account is Rs. 11,77,456 as on 1st May, 1998. These figures have been given just with a view to show that credit purchases were shown as having been made from these billing agents/name lenders to aforesaid extent which proves that the assessee used black money for purchase of raw material from undisclosed sources which are within the exclusive knowledge of the assessee.

117. On a careful consideration of the entire relevant facts, we are of the view that it would be just and proper to direct the AO to restrict the addition in respect of undisclosed income relating to purchases shown as having been made from these three billing agents/name lenders, to only 25 per cent of total purchases claimed to have been made from these three parties i.e. 25 per cent of Rs. 2,92,93,288 which comes to Rs. 73,23,322. The basis of adopting 25 per cent of such purchases is same as discussed in detail while upholding the addition of 25 per cent in the case of NKPL in relation to similar grounds."

5.11. It is worth mentioning Hon'ble Apex Court in N K Proteins Ltd. vs. DCIT (2017) 250 Taxman 22 on the issue of income from undisclosed sources and bogus purchases shown on the basis of fictitious invoices where the assessee filed SLP against the decision of Hon'ble Gujarat High Court in N K Industries Ltd. vs. DCIT (2016) 292 CTR 354 (Guj), wherein it was held that addition on the basis of undisclosed income could not be restricted to certain

percentage when the entire transaction was found to be bogus, the Hon'ble Apex Court dismissed the SLP and confirmed the decision of Hon'ble Gujarat High Court.

5.12. Admittedly, in such type of cases, there is no option but to estimate the profit which depends upon the subjective approach of an individual and the material facts available on record and also considering the fact whether the assessee is a manufacturer or a trader or both. In the present appeal, undisputedly the notice issued u/s 133(6) of the Act was never replied/served upon the concerned parties. It is worth mentioning that even before this Tribunal the assessee was asked to produce the concerned parties so that the genuineness of the transaction can be explained but the learned counsel for the assessee expressed his inability to produce the party, which clearly establishes that the genuineness of the transaction is under doubt or it can be said not established by the assessee or remained to be proved. So far as the decision relied upon by the assessee in the case of Nikunj Exim Enterprises Pvt. Ltd. is concerned, we are of the view that in the present appeal the assessee is a trader therefore,

there cannot be any sale without purchases and the profit element embedded therein remained to be taxed. Thus, to plug the leakage of revenue and by taking a pragmatic view, we are of the view that it will meet the ends of justice if the addition is sustained @12.5% of such bogus purchases. Thus, the appeal of the assessee is partly allowed.

Finally, the appeal of the assessee is partly allowed.

This order was pronounced in the open court in the presence of the ld. representatives from both sides at the conclusion of the hearing on 06/09/2018.

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

मुंबई Mumbai; दिनांक Dated : 25/09/2018
*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**