

आयकरअपीलीयअधिकरण,सुरतन्यायपीठ,सुरत
**IN THE INCOME TAX APPELLATE TRIBUNAL,
 SURAT BENCH, SURAT**
**BEFORE SHRI H. S. SIDHU, JUDICIAL MEMBER
 AND SHRI O. P. MEENA, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A No.2932 & 3277/AHD/2016:

निर्धारणवर्ष/Assessment Year: 2007-08

1. Shri Dipak Banwarilal Agarwal, 103 Devsagar, Dalgiya Street, Mahidarpura Surat PAN:AFPPA6178M 2. Income Tax Officer, Ward- 2(3)(7), Surat	V.	1. Income Tax Officer, Ward- 2(3)(7), Surat 2. Shri Dipak Banwarilal Agarwal, 103 Devsagar, Dalgiya Street, Mahidarpura Surat PAN:AFPPA6178M
अपीलार्थी Appellant		प्रत्यर्थी/ Respondent

निर्धारितकीओरसे Assessee by	Shri Prakash Jhunjunwala, C.A.
राजस्वकीओरसे Revenue by	Shri Prasenjit Singh, CIT(D.R.)
सुनवाईकीतारीख Date of hearing	17.07.2019
उद्घोषणाकीतारीख Date of pronouncement	18.07.2019

आदेश /ORDER

PER O. P. MEENA, AM

1. The above cross appeals by the Assessee and Revenue are directed against the order of learned Commissioner of Income tax (Appeals)-4, Surat (in short “the CIT (A)”) dated 01.09.2016 pertaining to Assessment Year 2007-08, which in turn has arisen from the assessment order passed under section 143 (3) r.w.s 147 dated 09.03.2015 of Income Tax Act, 1961 (in short ‘the Act’) by the Income Tax Officer, Ward- 2(3)(8), Surat (in short “the AO”).

2. The grounds of appeal raised by the Assessee in I.T.A.No. 2932/AHD/2016 for the assessment year 2007-08 are read as under:

"1. The Hon'ble CIT (Appeals)-4, has erred in confirming reopening of the case u/s. 147 of the Act.

2. The Hon'ble CIT (Appeals)-4, has erred in rejecting the books of account without any proper reason. The books of account rejected without any opportunity to the assessee and without issuing any show-cause notice in this regard.

3. The Hon'ble CIT (Appeals)-4, has erred in confirming the addition made against bogus purchase to the extent of Rs.6,69,69,018/- by estimating net profit of 5% on total sales.

4. The Hon'ble CIT (Appeals)-4, has erred in making addition of Rs.6,69,69,018/- by estimating net profit at 5% without any material on record."

3. The grounds of appeals raised by the Revenue in I.T.A.No. 3277/AHD/2016/A.Y. 07-08 read as under:

"1. On the facts of the circumstances of the case and in Law, the Ld. CIT (A) has erred in deleting the additions of Rs.2,15,33,387/- on account of bogus purchase.

2. On the facts and in the circumstances of the case and in Law, Ld. CIT(A) has erred in estimating income @ 5% of bogus purchases without appreciating the fact that during the course of Search & Seizure operations at the premises of Shri Pravin Jain and other related persons, while recording his statements on oath, Shri Pravin Jain has admitted that they used to operate and manage bogus concerns like, among others, M/s. Kunal gems, Mohit International, M/s. Natasha Enterprises & M/s. New Plant Trading Co. Pvt. Ltd., through which they provided bogus purchase, bills to, among others, the assessee. Therefore, CIT (A) should have treated whole amount of these purchases as income of the assessee as assessee reduced his income to this extent by inflating his purchases by this amount in his P & L account.

3. On the facts and in the circumstances of the case and in Law, Ld. CIT(A) has erred in accepting the retraction of entry operator Shri Pravin Jain as genuine retraction without appreciating the fact that retraction of his original statement after lapse of nearly 8 months, from the date when

it was originally made by him is not a valid retraction as it was done after lapse of a long period without any valid reason. The retraction was duly rebutted by the Department as evidences of parallel books and benami concerns were detected during search operation at various premises belonging to Shri Pravin Jain and his associates.

4. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in accepting the plea of the assessee to estimate the profit at 5% of the bogus purchase on the basis that proper books of accounts and stock register were maintained without considering the fact that no such books of accounts and documents (other than purchase bills) were produced before AO.CIT(A) did not give any opportunity to the AO to rebut the contention of the assessee raised before him.”*

Now we will take up assessee appeal from adjudication

I.T.A.No. 2932/AHD/2016/By assessee

4. Ground No.1 – Relates to Reopening of assessment u/s.147 of the Act.

5. Brief facts as discernible from the orders of lower authorities are that a search and survey operations were carried out by the Investigation Wing, Mumbai in the case of Shri Praveen Kumar Jain and his group on 01.10.2013, which resulted in collection of evidences and other findings, which conclusively proved that the said Shri Praveen Kumar Jain had, through a web of concerns, run and operated by him, provided accommodation entries to various parties. The search revealed that at most of the premises shown by the said Shri Praveen Kumar Jain as the registered offices and place of operation of various entities, were non-existent and no genuine business was seen to be carried out from there. It was also proved that companies were managed using dummy directors, who were not aware of any aspect of business of the company. In the statement recorded on oath

u/s.132(4) of the Act, of Shri Praveen Kumar Jain, he also admitted that he is indulged in providing accommodation entries and also explained complete modus operandi of providing such entries. Thus, the service provider as also the persons through whom these transactions of accommodation entries were carried out, has accepted the same. On verification of the assessment records, it is seen that the assessee had filed his return of income for the year under consideration disclosing a total income of Rs.3,26,280/-. Assessment in the case was completed u/s.143(3) of the Act determining the total income of the assessee at Rs.7,02,370/-. The assessee has disclosed purchases of Rs. 88.97 Crores in his P & L account, which inter-alia included bogus purchases of Rs.8,78,00,035/- being accommodation entries taken from five bogus concern of Shri Pravin Kumar Jain. Since the evidential and material facts found during the course of search and survey in the case and group cases of Shri Praveen Kumar Jain prove giving of accommodation purchase entries of Rs.8,78,00,035/-, it is prima facie apparent that the assessee has wrongly taken the same in his books of accounts as purchases for the year under consideration. Hence, the AO has have a reason to believe that an income of Rs.8,78,00,035/- as stated above, has escaped assessment in the hands of the assessee for the year under consideration. Therefore, the AO was satisfied that the case of the assessee is a fit case for action u/s.147 of the Act. Hence, the assessment was reopened u/s.147 of the Act. Notice under section 148 of the Act was issued on 28.03.2014 after recording reason for initiation of proceedings under section 147 of the Act.

6. The assessee has carried the matter before CIT (A). Wherein the assessee has submitted that the original assessment was passed u/s 143(3) of

the Act. The reopening of the case was made after completing of 4 years from the end of relevant assessment order. In this situation, the Ld. AO has duty bound to demonstrate that there was failure on the part of assessee to disclose all materials facts of the case in original assessment proceedings. The AO has never brought any such facts in reason recorded for reopening even in his assessment order; hence, the reopening of the case is bad in law. It was submitted that the Ld.AO has not brought any evidence on records in forming reason to believe. It is well settled principle that just information from investigation wing or statement of one person cannot become reason to believe for reopening, without bringing any independent material evidence on record. The Ld. AO has failed to disclose what are the evidence collected and what are the other findings and in what manner and how the evidence helped him in forming his reason to believe in his reason recorded and also in his assessment order. In such situation the basic condition reason is missing and the reason given by the Ld. AO are just reason to suspect and the reopening on the basis of such suspect is bad in law. Reliance was placed on various case laws as mentioned in appellate order by the Ld. CIT(A). It was further submitted that retracted statement of third party could not be made basis of reopening of assessment. However, the CIT (A) observed that there was credible information from Investigation Wing Mumbai regarding search and seizure action in the case of Shri Pravin Kumar Jain who were found engaged in providing accommodation entries. There was not only credible information with the AO from credible sources, but the AO has also applied his mind and recorded the conclusion that the purchases were not genuine and

therefore, bogus. Therefore, the requirement of section 147 of the Act was clearly met and therefore, reopening of assessment is justified. The assessee was one of such beneficiary who has received accommodation entries. Therefore, the AO has rightly reopened the assessment. The Id.CIT(A) has also supported his view by placing reliance in the case of Phoolchand Bajranglal v. ITO [1993] 203 ITR 456 (SC) and Dishman Pharmaceuticals & Chemicals v. DCIT (OSD) [2012] 346 ITR 228 (Gujarat)

7. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee submitted that the notice under section 148 of the Act was issued on 28.03.2014 i.e., after expiry of four years from the end of the relevant assessment year. In the reasons recorded by the AO, there is no whisper or allegation by the AO against the assessee that any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year. Therefore, after placing reliance on the various decisions of Hon'ble High Court including decisions of Hon'ble High Court of Gujarat in the case of Shree Chalthan Vibhag Khand vs. DCIT [2015] 376 ITR 419 (Guj) and General Motors India Pvt. Ltd. vs. DCIT (2014) 360 ITR 527 (Guj.). It was submitted that reopening of assessment is bad in law. The learned counsel for the assessee also relied for this proposition in the case of decision of Co-ordinate Bench of ITAT, Surat in the case of Jitendra Kumar Pukhraj Ranka vs. ITO [ITA No.790/Ahd/2017/SRT dated 21.02.2018] Surat Bench of Tribunal in support this contention on behalf of the appellant. The Id. Counsel

contended that the AO has not applied his mind and he has merely acted and initiated reassessment proceedings and issued notice u/s. 148 of the Act on the basis of report of DGIT (Inv.), Mumbai which was received by him along with in respect of alleged accommodation entries of bogus bills of purchases alleged to be taken by the assessee. The learned counsel for the assessee also relying on some decision submitted that the conclusion that the AO has reason to believe that income chargeable to tax as escaped assessment within the meaning of s. 147 of the Act, is not tenable in law.

8. *Per contra*, the Ld. CIT (DR) supporting the order of Ld. CIT (A) drew our attention towards para 7.1.3 of the order of CIT (A) and submitted that in the case of Dishman Pharmaceuticals and Chemicals Ltd. vs. DCIT (OSD) [2012] 346 ITR 228 (Guj.) the Hon'ble High Court wherein has held that there is no set format in which such reasons must be recorded. It is not the language but the contents of such recorded reasons, which assumes importance. The Ld. CIT (DR) vehemently pointed out that not only there existed new information with the AO from the credible sources, but also that he has applied his mind and recorded the conclusion that the purchases claimed were non genuine and therefore bogus, which clearly shows that what was disclosed was false and untruthful and in this situation, on the basis of report of DGIT (Inv.), Mumbai the AO was right in initiating the reassessment proceedings and issuing notice u/s. 148 of the Act. The Ld. CIT (DR) further stated that Ld. CIT (A) has placed reliance on the order of Hon'ble Supreme Court in the case of Phool Chand Bajrang Lal vs. ITO, 203 ITR 456 (SC) wherein the Hon'ble Supreme Court was considering the

question of reassessment beyond four years in the case of an assessee firm, and had held that in the case of acquiring fresh information specific in nature and reliable relating to the concluded assessment which went to falsify the statement made by the assessee at the time of original assessment and therefore, he would be permitted under the law to draw fresh inference from such facts and material. The Ld. CIT (DR) further relied in the case of Hon`ble Supreme Court judgement in the case of Pr. CIT v. Pramamount Communication (P.) Ltd. [2017-TIOL-253-SC-IT] affirming the judgement of Hon`ble Delhi High Court in the case of Pr. CIT v. Paramount Communication (P.) Ltd. [2017] 79 taxmann.com 409 (Delhi) [2017] 392 ITR 444 (Delhi) held that Information regarding bogus purchase by assessee received by DRI for CCE which was passed on to the revenue authorities was “tangible material on record “to initiate valid reassessment proceedings. Similarly, learned CIT(D.R.) submitted that the Hon`ble Gujarat High Court in the case of Amit Polyprints (P) Ltd. v. DCIT [2018] 94 taxmann.com 393 (Gujarat) held that where reassessment proceedings were initiated on the basis of information received for Investigation Wing that the assessee had received certain amount from shell companies working as an accommodation provider, reassessment could not be held unjustified. Similarly in the case of Aradhna Estate (P) Ltd. v. DCIT [2018] 91 taxmann.com 409 (Gujarat) the Hon`ble Gujarat High Court held that where reassessment proceedings were initiated on the basis of information received from Investigation Wing that the assessee had received certain amount from shell companies working as an accommodation entry provider, merely because these transaction were

scrutinized by Assessing Officer during original assessment , reassessment could not be held unjustified. Therefore, contended reopening of assessment based on receipt of information from Investigation Wing was held to be valid.

9. We have heard the rival submissions and perused the relevant material on record. The plain language employed in section 147 makes it clear that two conditions have to be satisfied before an Assessing Officer acquires jurisdiction to issue a notice under section 148 in respect of an assessment. These are: (1) the AO must have reason to believe that income chargeable to tax has escaped assessment; and (2) he must have reason to believe that such escapement was occasioned by reason of omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Thus, the two conditions must co-exist in order to confer jurisdiction on the AO. It is also imperative for the AO to record his reasons before initiating reassessment proceedings as required by section 148(2). Thus, section 147 authorizes and permits the Assessing Officer to assess or reassess income chargeable to tax, if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer

the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. We find that an information was received from DGIT (Inv) Mumbai which clearly mentioned that the assessee has taken accommodation entries of Rs.8.78 Crores from above mentioned parties which are admitted to be bogus in search and seizure operation carried on in the case of Shri Pravin Kumar Jain group that they have provided accommodation entries. Based on this information and after analyzing and verification of the assessment records and the material available on record, the AO has believe that income chargeable to tax has escaped assessment for assessment year under consideration. Thus, we do not find that there was any borrowed satisfaction of the AO, as there was prima-facie tangible material was available before the AO to form an opinion. Therefore, the assessment was reopened u/s.147 of the Act by issue of notice under section 148 of the Act. Under these circumstances, it cannot be said that there was no tangible material available with the AO. If the AO has a *prima facie* material to form an opinion/belief that the income chargeable to tax has escaped assessment. The Hon`ble Supreme Court in the case of Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC), held that in **determining whether commencement of reassessment proceedings was valid, it has only to be seen whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at such stage.** The transactions of the assessee are required to be verified in detail on the basis of the material/evidence collected during the inquiry conducted by the ADIT (Inv).

This view is further supported by the judgement in the case of Phoolchand Bajranglal v. ITO [1993] 203 ITR 456 (SC) wherein the Hon`ble Supreme Court was considering the question of reassessment beyond four years in the case of an assessee firm, and had held that in the case of acquiring fresh information specific in nature and reliable relating to the concluded assessment which went to falsify the statement made by the assessee at the time of original assessment and , therefore, , he would be permitted under the law fresh inference from such facts and material. In this case, there was specific information in possession of the AO. Therefore, the decisions relied by the learned counsel for the assessee are distinguishable on facts. The reason for reopening of assessment are as under:

Reasons recorded:- "A search and seizure action was carried out in the case of Shri Praveen Kumar Jain and group on 01.10.2013 by the Investigation Wing, Mumbai. Evidences collected and the statement of various persons was recorded which led to detection of accommodation entries of approx. Rs.8879 Crores. On compilation of list of the beneficiaries, it is noticed that the assessee Shri Dipak B. Agarwal , is one of the beneficiary and is involved in bogus purchase transactions from several parties amounting to Rs. 8,78,00,035/-. It appears that such transactions are bogus and therefore, have been incurred to curb the incidence of tax by diminishing the total income of the assessee for the period under consideration relevant to such transactions. As per the facts as detailed above, the income to the tune of Rs. 8,78,00,035/-

pertaining to period under consideration needs to be brought within the ambit of taxation, in the hands of the assessee.

In view of the facts, I have reason to believe that there is escapement of income to the tune of Rs. 8,78,00,035 /- in the hands of the assessee on account of transactions under consideration within the meaning of section 147 of Income Tax Act,1961. I am satisfied that the case of the assessee is a fit case for action u/s.147 of the Act and issue of notice u/s.148 of the Income Tax Act.”

10. The plain reading of above reasons would show that the AO had received information from Investigation Wing Mumbai that in the case of the purchases amounting to Rs.8.78 Crores from above stated parties are bogus as admitted by Shri Pravin Kumar Jain in his statement recorded under section 132(4) of the Act. The AO has verified the said information from assessment records available with him and find that the assessee has disclosed total purchases of Rs. 88.97crores, which includes bogus purchases of Rs. 8.78 crores entered in the books of accounts by way of accommodation entries. Therefore, the assessee has suppressed his income to that extent. Thus, the AO has reached a valid conclusion that he has reason to believe the income chargeable to tax has escaped assessment within the meaning of section 147 of the Act. Here, in the instant case, there was report of the investigation wing that the assessee had indulged in bogus transaction. Hence, ratio of above decision is clearly applicable. We further observed that the Hon`ble Delhi High Court in the case of Midland Fruit &

Vegetable Products (India) (P) Ltd. v. CIT [1994] 73 Taxman 30 (Delhi) has laid down that where the letter from ADIT(Inv) regarding bogus transactions was sufficient material for the AO to legitimately form a reasonable belief for initiating the assessment proceedings. Further, the Hon'ble Gujarat High Court in the case of Aaspas Multimedia Ltd. v. DCIT-Circle 1(1) [2017] 83 taxmann.com 82 (Gujarat) has held as "the information received from PDIT(Investigation) regarding bogus transaction was sufficient tangible material to form an opinion for reopening of assessment proceedings and that income chargeable to tax has escaped assessment. The sufficiency reason cannot be examined by the Court. Thus, in the light of foregoing ruling of Hon'ble Supreme Court, and Hon'ble jurisdictional High Court, the sufficiency of material at this stage in determining whether commencement of proceedings u/s 147(a) was valid, what was to be seen was only the prima facie material; the sufficiency or correctness of the material was not a thing to be considered at that stage. The Hon'ble Supreme Court in the case of Phool Chand Bajrang Lal v. ITO [1993] 203 ITR 456 (SC) held that One of the purposes of section 147 is to ensure that a party cannot get away by willfully making a false or untrue statement at the time of the original assessment and when that falsity comes to notice, to turn around and say: "You accepted my lie, now your hands are tied and you can do nothing." It would be a travesty of justice to allow the assessee that latitude. Further relied in the case of Hon'ble Supreme Court judgement in the case of Pr. CIT v. Pramamount Communication (P.) Ltd. [2017-TIOL-253-SC-IT] affirming the

judgement of Hon`ble Delhi High Court in the case of Pr. CIT v. Paramount Communication (P.) Ltd. [2017] 79 taxmann.com 409 (Delhi) [2017] 392 ITR 444 (Delhi) held that Information regarding bogus purchase by assessee received by DRI for CCE which was passed on to the revenue authorities was “tangible material on record “to initiate valid reassessment proceedings. Our view is further supported by the judgement of the Hon`ble Gujarat High Court in the case of Amit Polyprints (P) Ltd. v. DCIT [2018] 94 taxmann.com 393 (Gujarat) wherein it was held that where reassessment proceedings were initiated on the basis of information received for Investigation Wing that the assessee had received certain amount from shell companies working as an accommodation provider, reassessment could not be held unjustified. Similarly, in the case of Aradhna Estate (P) Ltd. v. DCIT [2018] 91 taxmann.com 409 (Gujarat) the Hon`ble Gujarat High Court held that where reassessment proceedings were initiated on the basis of information received from Investigation Wing that the assessee had received certain amount from shell companies working as an accommodation entry provider, merely because these transaction were scrutinized by Assessing Officer during original assessment , reassessment could not be held unjustified.

11. In the light of ratio as laid down by above discussed judgements and that the AO has in his possession a credible information that income chargeable to tax has escaped assessment hence proceedings u/s.147 read with section 148 of the Act has been correctly initiated. Therefore, the contention and arguments raised by the learned counsel for the assessee are

not sustainable in law. Accordingly, the validity of reopening of assessment is held to be sustainable in law, and therefore, upheld. Consequently, Ground No. 1 of the appeal is therefore, dismissed.

12. Ground No. 2 to 4 states that the Ld. CIT (A) has erred in rejecting books of accounts and thereby confirming the addition made against bogus purchases to Rs.6,69,69,018 by estimating net profit at 5% of total purchases without any material on record. Similarly, Ground No. 1 to 4 of Revenue appeal are against the deletion of addition by estimating income @ 5% of total purchases by the CIT(A).

13. Succinctly, facts are that the search and seizure action carried out on 01.10.2013 in the case of Shri Pravin Kumar Jain Group, revealed that the said Group had provided accommodation entries to various parties in respect of bogus unsecured loan and bogus purchases through benami web concerns. It was noticed from the report of DGIT (Inv) Mumbai that the assessee-firm has received accommodation entries of Rs. 6,38,00,036 from M/s. Kunal Gems, Rs.1,39,99,944 from M/s. Mohit International, Rs.49,99,985 from M/s.Natasha Enterprises and Rs.24,99,990 from M/s. New Planet Trading Co (P) Ltd. aggregating to Rs.8,78,00,035 during the assessment year under consideration. The assessee has filed original return of income declaring total income of Rs.3,36,280 which was assessed vide order dated 21.12.2009 under section 143(3) of the Act at Rs.7,02,370. Accordingly, the case of the assessee was reopened and a notice under section 148 of the Act was issued

on 28.03.2014 and same was served upon the assessee. The statutory notice was issued and scrutiny assessment was made. The assessee has filed written submissions stating that entire purchases are genuine and verifiable. The transactions were done through banking channel. The Tax Auditor have verified the purchase and sale register. There is no legal validity of statement given by the third party. Shri Pravin Kumar Jain has retracted from the statement. The assessee has relied on several judgements of High Courts and tribunals. However, the AO was of the view that during search and seizure in the case of Shri Pravin Kumar Jain Group it has been conclusively proved that they are engaged in providing accommodation entries. The parties are issuing bills without delivery of goods. The AO observed the above concerns are bogus concern of Shri Pravin Kumar Jain. Shri Pravin Kumar Jain has accepted the same as bogus concern in his statement recorded under section 132(4) of the Act. Therefore, the onus lay on the assessee was not discharged. In view of these facts and circumstances, the AO had treated the entire purchases amounting to Rs.8,78,00,035 as bogus purchase and added to total income.

14. Being aggrieved, the assessee filed an appeal before the Id. CIT (A). It was submitted that nothing related to the assessee was found during search and seizure action in the case of Shri Pravin Kumar Jain. Nor the searched Assessing Officer has recorded any satisfaction that anything belongs to the assessee. The transactions are covered by audit report and no adverse is noted by them. All the purchases are through banking channel and payment

is made by account payee cheques. The AO has not pointed out any defects in the books of accounts and stock is duly reflected in accounts. The addition made solely based on third party statement is not tenable in law. The assessee has also placed reliance on various case laws as mentioned in the appellate order by the Ld. CIT (A). However, CIT (A) observed that in the statement under section 132(4), Shri Pravin Kumar Jain had admitted that these concerns are not available on the premises shown in income-tax return. The address given in respect of these entities were found non-functional. Some of the doubtful concerns were covered under section 132(1) in which they also stated that they are not carrying on any business and merely providing accommodation entries. Pen drive was found from Shri Pravin Kumar Jain showing parallel books of accounts. The assessee has totally avoided the production of books of accounts including production of stock register, supporting bills and vouchers in appeal. The assessee has been maintaining silver and gold jewellery together in stock, which does not give true picture and affairs of the business. The CIT (A) further observed that there are so many corroborating evidences including statement of brokers, record of brokers and finding of all records of concern at a single place. Shri Pravin Kumar Jain has chosen to retract after 7 months and does not cooperate with Department in subsequent enquiries. The CIT (A) observed that Hon`ble High Court in the case of Mayank Diamonds Pvt. Ltd. V. ITO [Tax Appeal No. 200 of 2003], dated 17.11.2014 (Gujarat) has observed the net profit in diamond trade between 3% to 7%. The AO made addition of

Rs.8,78,00,035 and the total income has been assessed at Rs.8,85,02,405 which would give net profit at 6.06% . Therefore, Ld. CIT (A) has considered net profit of 5% in the business as fair estimate on the facts of the case. The total income directed to be assessed at Rs.6,76,71,388 as against the assessed income under section 143 (3) of the Act at Rs.7,02,370. Hence, addition of Rs.6,69,69,018 being the difference in assessed income and income estimated by the CIT (A) was confirmed.

15. Being aggrieved the Assessee as well as Revenue has filed this appeal before the Tribunal. The learned counsel for the assessee submitted that the copies of statement recorded from seller were not provided to the assessee. Nor any cross-examination was allowed as demanded. The learned counsel for the assessee placed reliance in the case of Pr. CIT v. Teju Rohitkumar Kapadia[2018] 94 taxmann.com 324 (Gujarat) in which SLP was dismissed in SLP NO. 12670/2018 dated 04.05.2018 (SC) wherein it was held that where purchases made by the assessee-trader were duly supported by bills and payments were made by account payee cheques, seller also confirmed transaction and there was no evidence to show that amount was recycled back to the assessee, Assessing Officer was not justified in treating said purchases as bogus under section 69C. (Copy filed-PB-1-3). The learned counsel for the assessee submitted that the AO has not rejected books of accounts; therefore, the whole addition should have been deleted. The learned counsel for the assessee submitted that no addition could be made without giving an opportunity of cross examination of the parties whose

statement was relied upon by the AO. The learned counsel for the assessee submitted that the assessee has filed day-to-day quantity details of polished diamonds purchased from above parties and their corresponding sales from that quantity. It was therefore, claimed that where the relevant quantity of sales of diamonds, the quantity of said diamonds were actually purchased. It was submitted that when the purchases are supported by bills and there is payment by account payee cheques, no addition is called for. The learned counsel for the assessee submitted the CIT (A) has estimated net profit at 5% of total purchases including recorded purchases, which is not correct in the light of tribunal decisions in the case of Deluxe Diamonds v. ITO [I.T.A.No. 1396/Ahd/2017 dated 11.04.2018- Surat-Trib], DCIT v. J. B. Brothers [I.T.A.No. 3661/Ahd/2015 dated of Surat bench, ITAT] and DCIT v. Opulent Jewels Pvt. Ltd. [I.T.A.No. 1855/Ahd/2010/SRT] wherein the Tribunal has restricted the estimation of 5% of bogus purchases and not of entire purchases disclosed in books of accounts by the assessee. Therefore, the CIT (A) should have considered 5% of disputed purchases and not the entire purchases turnover made by the assessee.

16. *Per contra*, the Ld. CIT (DR) vehemently supported the order of the AO for making addition of entire bogus purchases and relied on the order of the Ld. CIT (A) for estimation of income @5% of purchases and submitted that the contention of the assessee that no information was supplied but the assessment was reopen on the basis of information received from DGIT(Inv), hence, the contention is not acceptable. The AO has examined the matter in

details as discussed in the assessment order. The Ld. CIT (DR) submitted that seller parties are is not traceable, hence, entire purchases needs to be held as bogus against which the Department is in appeal. Therefore, the order of the AO is upheld.

17. We have heard the rival submissions and perused the relevant material on record. We find that the assessee has made purchases of Rs.8.78 crores from above mentioned parties. The assessee has failed to produce the above said parties for verification to prove the genuineness of purchases. Therefore, reliance placed in the case of Pr. CIT v. Tejua Rohitkumar Kapadia[2018] 94 taxmann.com 324 (Gujarat) in which SLP was dismissed in SLP No.12670/2018 dated 04.05.2018 (SC) is not applicable in this case. Further, Shri Pravin Kumar Jain has admitted in his statement recorded under section 132(4) of the Act during the course of search and seizure operation conducted in their case that they used to provide bogus accommodation bills. However, later the statement was retracted by Shri Pravin Kumar Jain, which is not found acceptable, as same was retracted after 7 months. However, the AO treated the whole amount of Rs.113.55 crores as bogus purchases. The assessee has duly produced the copies of bills, invoices and payments are made by account payee cheques. This shows that purchases have been made, but may be not from the party from whom purchases bills have been obtained. The only possibility is therefore, is that the assessee might have inflated the purchases, as sale has not been doubted by the AO. In view of this matter, it is not just or reasonable to treat entire purchases when

corresponding sales has not been doubted by the AO. There cannot be any sales without making purchases. We are, therefore, of the view that it is a simple logic that when the AO has not questioned the sales /stock then there is no logic to disallow the 100% bogus purchases. It is obvious that there cannot be any sales without purchases. The books of accounts are audited under section 44AB of the Act and no adverse comments pointed out by the auditors. Quantity records are maintained. There is no evidence that cash received back except statement of Shri Pravin Kumar Jain, which is general in nature and same was not made available to the assessee. We further notice that the Hon`ble Jurisdictional High Court in the case of Mayank Diamonds Pvt. Ltd. v. ITO [Tax Appeal No. 200 of 2003] dated 17.11.2014 has observed as under:

“5. We have heard learned advocates for both sides and perused the orders passed by the CIT as well as the Tribunal. As a result of hearing and perusal of records, it is borne out of that the average profit which has been considered for this industry is around 3 to 7%. The Tribunal in the instant case has directed addition at the rate 12.5%, which is in our opinion, is on higher side. Learned advocate for the appellant has fairly conceded that excess 7% is on higher side and that at the most 3% may be applied. In that view of the matter, going by the peculiar facts of the present case, we are of the view that ends of justice will be met by taking mean of maxim and minimum of the profit rate which comes to 5%. Therefore, we think it fit to direct the Assessing Officer to apply 5% G.P. rate as the rate of 12.5% is drastically higher and 1.03% is drastically lower. Gross profit rate of 5% is the average rate of the industry and we think it fit to make addition on account of 5% gross profit rate. The

addition be made accordingly. We therefore, answer the question raised in the negative i.e. against the revenue and in favour of the assessee."

18. We observe that the assessee has failed to substantiate the purchases by not producing the parties in question and admission of the party that they have indulged in providing bogus accommodation entries. The learned counsel for the assessee further placed reliance on the decisions in the case of *Deluxe Diamonds v. ITO* [I.T.A.No. 1396/Ahd/2017 dated 11.04.2018-Surat-Trib], and *DCIT v. Opulent Jewels Pvt. Ltd.* [I.T.A.No. 1855/Ahd/2010/SRT] wherein the Tribunal has restricted the estimation of 5% of bogus phases and not of entire purchases disclosed in books of accounts by the assessee by following decision of Hon'ble Gujarat High Court in the case of *Mayank Diamonds Pvt. Ltd. v. ITO* [Tax Appeal No. 200 of 2003] dated 17.11.2014 [2014] 11 (TMI) 812 (Gujarat). Therefore, in the light of above facts and circumstances and considering the net profit of 5% as the average rate of the industry as observed by the Hon'ble Jurisdictional High Court and following the judicial pronouncements by the Co-ordinate Bench of Tribunals and the decision of Hon'ble Jurisdictional High Court in the case of *Mayank Diamonds Pvt. Ltd. v. ITO* [Tax Appeal No. 200 of 2003] dated 17.11.2014; we deem it fit to restrict the addition to 5% of total bogus purchases of Rs.8,78,00,035. Accordingly, addition of Rs.43,90,000 i.e. [5% of Rs. 8,78,00,035] is sustained as against the addition sustained by

the Ld. CIT (A) and balance is deleted. Accordingly, Ground No. 2 to 4 of appeal of the assessee are therefore, partly allowed.

19. In the result, the appeal of the assessee is partly allowed.

I.T.A.No. 3279/AHD/2016:AY07-08: by the Revenue

20. Ground no. 1 to 4 of the revenue relates to deletion of addition of Rs.2,15,33,387 by estimating income @5% of total purchases without appreciating facts. These grounds of appeal are covered by the Ground No. 2 to 4 of appeal of the assessee, wherein we have partly allowed the appeal of the assessee. Therefore, in view of our findings given therein, these grounds of appeal becomes infructuous hence, are treated as dismissed.

21. In the result, the appeal of the Revenue is dismissed.

22. In the result, the appeal of the assessee is partly allowed, and appeal of Revenue is dismissed.

23. The order pronounced in the open Court on 18.07.2019

**Sd/-
(H. S. SIDHU)
JUDICIAL MEMBER**

**Sd/-
(O.P.MEENA)
ACCOUNTANT MEMBER**

Surat: Dated: 18th July, 2019/opm

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

// TRUE COPY //

Assistant Registrar, Surat