

**IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai**

Before Shri Shamim Yahya, Accountant Member

ITA Nos. 4017 to 4024/Mum/2018
(Assessment Years: 2007-08 to 2014-15)

M/s. Minawala Gems & Jewels P. Ltd. 95, Heera Panna Shopping Centre, Haji Ali, Mumbai 400026	Vs.	Income Tax Officer-5(2)(3) Room No. 566, 5th Floor Aayakar Bhavan, M.K. Road Mumbai 400020
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PAN – AABCM5085D

Appellant

Respondent

Appellant by:	Ms. Dinkle Hariya
Respondent by:	Ms. Chaitanya Anjariya

Date of Hearing:	11.06.2019
Date of Pronouncement:	08.08.2019

ORDER

Per Shamim Yahya, AM

These are appeals by the assessee wherein the assessee is aggrieved that the learned CIT(A) has erred in sustaining 3 percent disallowance on account of bogus purchases for the respective assessment years.

2. Brief facts of the case are that the assessee is engaged in the business of manufacturing and trading of jewellerys. Information was received from the Investigation Wing that assessee has indulged in bogus purchases. The assessment was accordingly reopened. The AO in this case made 25.5 percent disallowance for A.Y. 2007-08 and 12.5 percent disallowance for other assessment years on account of bogus purchases. Upon assessee's appeal the learned CIT(A) confirmed the same to the extent of 8 percent of the bogus purchases. The details of disallowances are under: -

Sr. No.	Disallowance	A.Y. 07-08	A.Y. 08-09	A.Y. 09-10	A.Y. 10-11	A.Y. 11-12	A.Y. 12-13	A.Y. 13-14	A.Y. 14-15
1	Unexplained expenditure u/s 69C	4,35,149/- (AO 25.50% of alleged bogus purchases)	87,500/- (AO 12.50% of alleged bogus purchases)	1,17,818/- (AO 12.50% of alleged bogus purchases)	2,59,170/- (AO 12.50% of alleged bogus purchases)	13,39,217/- (AO 12.50% of alleged bogus purchases)	20,75,664/- (AO 12.50% of alleged bogus purchases)	6,36,630/- (AO 12.50% of alleged bogus purchases)	4,71,676/- (AO 12.50% of alleged bogus purchases)
		1,36,517/- (CIT(A) 8% of alleged bogus purchases)	56,000/- (CIT(A) 8% of alleged bogus purchases)	75,403/- (CIT(A) 8% of alleged bogus purchases)	1,65,869/- (CIT(A) 8% of alleged bogus purchases)	8,57,099/- (CIT(A) 8% of alleged bogus purchases)	13,28,425/- (CIT(A) 8% of alleged bogus purchases)	4,07,443/- (CIT(A) 8% of alleged bogus purchases)	3,01,872/- (CIT(A) 8% of alleged bogus purchases)

Against the above order assessee is in appeal before the ITAT.

3. I have heard both the counsels and perused the records.

4. Upon a careful consideration I find that assessee has provided the documentary evidence for the purchase. Adverse inference has been drawn due to the inability of the assessee to produce the suppliers. No other defect is pointed out in other aspects of working. I find that in this case the sales have not been doubted. It is settled law that when sales are not doubted, hundred percent disallowance for bogus purchase cannot be done, the rationale being no sales is possible without actual purchases. This proposition is supported by the decision of the Hon'ble Jurisdictional High Court in the case of Nikunj Eximp enterprises (in Writ Petition No. 2860 order dated 18.06.2014). In this case the Hon'ble High Court has upheld hundred percent allowance for the purchases said to be bogus when sales are not doubted. However, in that case all the supplies were to government agency. In the present case the facts of the case indicate that assessee has made purchases from grey market. Making purchases through the grey market gives the assessee savings on account of non-payment of tax and others at the expense of the exchequer. In such situation in my considered opinion, on the facts and circumstances of the case the 12.5 percent disallowance out of the bogus purchases meets the end of justice. However, in this regard the learned counsel for the assessee has prayed that when only the profits earned by the assessee on these bogus purchase transaction is to be taxed the gross profit already shown by the assessee and offered to tax should be reduced from the standard

12.5 percent being directed to be disallowed on account of bogus purchase.

5. Upon a careful consideration I find considerable cogency in the submission of the learned counsel for the assessee, as otherwise it will be double jeopardy to the assessee. Accordingly I modify the order of the learned CIT(A) and direct that the disallowance in this case be restricted to 12.5 percent of the bogus purchases as reduced by the gross profit rate already declared by the assessee on these transactions. Learned counsel for the assessee fairly accepted this proposition.

6. One more issue raised for assessment years 2013-14 and 2014-15 is the adhoc disallowance of ₹4,00,000/- and ₹1,50,000/- out of the expenses by a cryptic remark by the Assessing Officer that some expenses are in cash and are by self made vouchers. The addition has further been upheld by the learned CIT(A) by a further cryptic remark that no argument has been advanced in this regard, despite the fact that assessee has duly raised a ground and referred the matter in the statement of facts.

7. Upon careful consideration I am of the opinion that the disallowance is based on surmise and conjecture without any cogent basis. It is settled law that addition based upon surmise and conjecture without any cogent material cannot be sustained. Accordingly I set aside the orders of authorities below and direct that the addition in this regard should be deleted.

8. In the result, the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 8th August, 2019.

Sd/-
(Shamim Yahya)
Accountant Member

Mumbai, Dated: 8th August, 2019

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -10, Mumbai*
4. *The Pr.CIT - 5, Mumbai*
5. *The DR, "SMC" Bench, ITAT, Mumbai*

By Order

//True Copy//

*Assistant Registrar
ITAT, Mumbai Benches, Mumbai*

n.p.