



Ashok Vakharia HUF
Assessment Years: 2009-10 to 2012-13

आयकर अपीलीय अधिकरण “ऐ” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI

श्री शक्तिजीत दे, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपील सं./ I.T.A. No.2994/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2009-10)
&
आयकरअपील सं./ I.T.A. No.2995/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2010-11)
&
आयकरअपील सं./ I.T.A. No.2996/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2011-12)
&
आयकरअपील सं./ I.T.A. No.2997/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2012-13)

Ashok S Vakharia HUF 205, Sahakar Niwas, Plot No. 160/161 Road No.2, Jawahar Nagar Phatak Rd. Goregaon (West), Mumbai-400062	बनाम/ Vs.	ITO-24(3)(1) Bandra Kurla Complex Bandra East Mumbai-400 062
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAAHA-4138-D		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

&
आयकरअपील सं./ I.T.A. No.3223/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2009-10)
&
आयकरअपील सं./ I.T.A. No.3224/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2011-12)

ITO-24(3)(1) Bandra Kurla Complex Bandra East	बनाम/ Vs.	Ashok S Vakharia HUF 205, Sahakar Niwas, Plot No. 160/161 Road No.2, Jawahar Nagar Phatak Rd.
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Mumbai-400 062		Goregaon (West), Mumbai-400062
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAAHA-4138-D		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri N.M. Porwal-Ld.AR
Revenue by	:	Shri Satish Chandra Rajore – Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	04/09/2019
घोषणा की तारीख / Date of Pronouncement	:	16/09/2019

आदेश / O R D E R

Per Bench: -

1. The assessee is under appeal for Assessment Years [AY] 2009-10 to 2012-13 whereas the revenue has filed cross-appeals for AYs 2009-10 & 2011-12. The order of learned first appellate authority for AYs 2009-10, 2011-12 & 2012-13 is common order which has been passed on 20/02/2018 whereas the order for AY 2010-11 has been passed on 12/03/2015. Since common issues were involved, the appeals were consolidated and heard together and now being disposed-off by way of this common order for the sake of convenience & brevity. The assessee has filed additional grounds of appeals for AYs 2009-10 to 2012-13 which contest validity of reassessment proceedings. The same being merely legal grounds and do not require appreciation of new facts and hence, taken on record as per the ratio of decision of Hon'ble Supreme Court rendered in **National Thermal Power Co. Ltd. V/s CIT [229 ITR 383]**. First, we take up cross-appeals for AY 2009-10.



Cross-Appeals for AY 2009-10

2.1 The assessee's grounds of appeal as well as additional grounds of appeal would read as under: -

1. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeal) erred in confirming addition of Rs.7620833/- under Section 69C of the Act on account of unexplained purchases made during the year, calculated on the basis of peak credit.
2. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeal) erred in not deleting observation made by Assessing Officer that payment received by purchase parties are returned to the applicant in cash after deducting small commission.
3. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) failed to appreciate that
 - (a) Proceeding initiated under section 147 /148 of the Act is on the basis of reason to suspect and not on reason to believe.
 - (b) There is no new tangible material in possession of the Assessing Officer which justify issuance of notice u/s 148 of the Act
 - (c) The initiation of proceeding under section 147 of the Act and issuance of notice under section 148 is bad in law and contrary to the provisions of the Act and liable to be cancelled / annulled.
4. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming order made under section 143(3) rws 147 of the Act by the learned Assessing Officer which is illegal, bad-in-law, ultra vires and without allowing reasonable opportunity of the hearing, without appreciating the facts, submission and evidences in their proper perspective, without providing copies of material used against the appellant and without providing cross examination of parties whose statement are relied upon is liable to be annulled.
5. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming charging of interest under section 234A, 234B, 234C and 234D of the Act.
6. Because in any view, the assessment framed u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961 is without jurisdiction, void ab-initio as the assessee challenges the validity of the assessment order on the ground that the ITO who had passed the order did not have the authority of law to act as the A.O. and to pass the impugned assessment order.
7. Because in any view, the A.O. has to record reasons showing due application of mind before taking recourse to reassessment proceedings, A.O. having initiated reassessment proceedings simply on the basis of information received from DGIT (Inv.) Mumbai without incorporating any corroborative material and his own satisfaction that income has escaped assessment, issuance of notice u/s 148 was not valid.

The grounds raised by the revenue read as under: -



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1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing to make a disallowance @12.5% of the impugned purchases ignoring the fact that Hawala parities are non-existent at the given address and further they have given affidavits before the Sales Tax Authorities about their bogus activities of issuing purchase bills without supplying any goods.
2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to see that the decision of the Hon'ble High Court in the case of N.K.Proteins Ltd. V/s DCIT, holding that addition cannot be restricted to certain percentage when entire transaction is bogus, had become final with dismissal of assessee's SLP & is squarely applicable.

2.2 Facts in brief are that the assessee being resident HUF stated to be engaged in the business of trading in ferrous / non-ferrous metals under proprietorship concern namely M/s Rikita Metals, was assessed for impugned AY u/s. 143(3) r.w.s. 147 on 26/02/2014 wherein income of the assessee was determined at Rs.248.11 Lacs after sole addition of *alleged bogus purchases* u/s 69C for Rs.246.79 Lacs as against returned income of Rs.1.31 Lacs filed by the assessee on 25/09/2009 which was processed u/s.143(1).

2.3 Pursuant to receipt of certain information from DGIT(Investigation), Mumbai/Sales tax Department, Govt. of Maharashtra, it transpired that the assessee obtained bogus accommodation entries of purchases amounting to Rs.246.79 Lacs from 5 suspicious parties. The details of the suppliers along with amount of respective purchases have already been extracted at para-4.1 of the quantum assessment order. Accordingly, as per due process of law, re-assessment proceedings were initiated against the assessee u/s 147 by issuance of notice u/s 148 on 25/03/2013 which was duly served upon the assessee. The assessee demanded copy of reasons recorded for re-opening which were supplied in due course. The statutory



notices u/s 142(1) and 143(2) were issued in due course of assessment proceedings wherein the assessee, *inter-alia*, was directed to substantiate the purchase transactions. The assessee reflected Gross Profit of 1.71% on turnover of Rs.274.62 Lacs.

2.4 Upon perusal of inquiries conducted by Sales Tax Department, Maharashtra, it transpired that these dealers were merely issuing bills without delivering any goods and the payment received by these parties were returned to the assessee in cash after deducting small commission.

2.5 To confirm the purchase transactions, notices u/s 133(6) were issued to all the 5 parties, however the same were returned back unserved in all the cases by postal authorities with the remarks "not known / unclaimed". The assessee was asked to provide the whereabouts of the parties or to produce them for verification of purchases. However, the assessee failed to do so but produced ledger of the parties, in support of the purchases.

2.6 The aforesaid factual matrix led the Ld. AO to treat the stated purchases as unexplained expenditure u/s 69C and accordingly, the same were added to the income of the assessee.

3.1 Aggrieved the assessee agitated the stand of Ld. AO before learned CIT(A) with partial success vide impugned order dated 20/02/2018 which is common order for AYs 2009-10, 2011-12 & 2012-13. The assessee also challenged the validity of reassessment proceedings, however, the same could not find favor with learned CIT(A) in view the decision of Hon'ble Apex Court rendered in **ACIT V/s Rajesh Jhaveri Stock Brokers Pvt. Ltd.** since the only condition to trigger reassessment proceedings, on factual



matrix, was the formation of belief that certain income escaped in the hands of the assessee. Reliance was also placed, *inter-alia*, on the decision of Hon'ble Bombay High Court in **Nikunj Eximp Enterprises Pvt. Ltd. V/s CIT [WP No.2860 of 2012]** while rejecting the legal grounds raised by the assessee.

3.2 The assessee, on merits, submitted that it had furnished all supporting material such as copies of purchase invoice, bank statements reflecting payment made to the suppliers through banking channels, corresponding sales invoices and therefore, the additions were made in a summary manner merely by relying upon the information received from Sales Tax Department, Maharashtra and relying upon depositions made by the suspected sellers in their affidavits filed during the sales tax proceedings that they have not made any sales during the year under consideration. It was also pleaded that the copies of information / documents received from VAT department which were used against the assessee were neither provided to the assessee nor any opportunity of cross examining the said suppliers was ever provided to the assessee which was in violation of principle of natural justice. The said submissions were duly considered in the appellate proceedings.

3.3 During appellate proceedings, keeping in view the submissions made by the assessee, the assessee was directed to produce the documents submitted before Ld. AO in support of the transactions along with proof of delivery of goods by the dealers to the assessee along with the details of



incidental expenses incurred on those transactions. However, the assessee could not produce any such details.

3.4 In the above background, learned CIT(A), after considering the provisions of Section 114 of Indian Evidence Act held that the order / findings of Sales Tax Authorities could be relied upon by learned AO and the initial burden was on assessee to prove that the stated purchases were genuine. It was also concluded that the incriminating material / evidences were of collateral in nature and the additions were not made solely on the basis of material gathered by Sales Tax Authorities, Maharashtra rather the fact of accommodation entries was duly confronted to the assessee and the assessee was provided with ample opportunities to rebut the allegations levelled by Ld. AO. Reliance was placed on the judgement of Hon'ble Apex Court rendered in **Kanungo & Co. V/s Collector of Customs 1983 ELT 1486 SC** as noted by Mumbai Tribunal in the case of **GLT Industries Ltd. V/s ACIT [65 ITD 380]**, to arrive at such a conclusion. It was also concluded, at para 8.3.13 of the impugned order, that the principles of natural justice could not be used to the advantage of the persons with a view to defeat the very purpose of justice as held in Hon'ble Apex Court in **Chairman, Board of Mining Examination V/s Ramjee [AIR 1977 SCC 965] & Kishanlal Agarwal V/s Collector of Customs [AIR 1967 Cal 80]**. Therefore, it was concluded that the plea of cross-examination was not only misleading but a concerted effort to protract the litigation to infinity since the assessee was fully aware of the facts that the parties in question were not only bogus entities but untraceable also. Further, the plea of cross-



examination was never raised by the assessee during assessment proceedings. In the above background, it was concluded that the plea was not bona-fide and there was no violation of principle of natural justice as alleged by the assessee.

3.5 In the background of decision of Hon'ble Apex Court in **CIT V/s P.Mohankala & Ors. [291 ITR 278]** and also the decision of Hon'ble Bombay High Court in **Naresh K. Pahuja V/s ITAT [375 ITR 526]**, it was held that payments through banking channel, simpliciter, would not establish the genuineness of the transactions and the primary onus casted upon assessee to prove the genuineness of the transactions remained undischarged. The strength was also drawn from the decision of Hon'ble Supreme Court in **CIT vs. Durgaprasad More (82 ITR 540)** to arrive at a conclusion that the transactions could not be considered as genuine.

3.6 Coming to the merits of the case, it was noted that similar additions, on peak credit basis, were made by Ld. AO for AY 2010-11 which was approved by first appellate authority and therefore, facts being the same, the addition in impugned AY were to be made on the same basis. Finally, the additions were confirmed partially by observing as under: -

8.3.23 It observed that for AY 2010-11, the AO has made an addition by applying peak credit, and the appeal filed by the appellant against the addition made has been dismissed by the CIT (A). There is no change in the facts of the case vis-a-vis AY 2010-11. The Hon'ble ITAT, Ahmedabad 'C' Bench has upheld addition made on the basis of peak credit in the case of Vijay Proteins Ltd. Vs. Assistant Commissioner of Income Tax(1996) 58 ITD 0428 affirmed by the Hon'ble High Court of Gujarat in the case of Vijay Proteins Ltd. v.CIT in ITR No. 139 of 1996 dated 09/12/2014 [Petitions for Special Leave to Appeal (C) No(S). 8956/2015 dismissed on 06/04/2015J. Hence, it would be appropriate to apply the same principle for the relevant AYs under consideration. It can be observed from the facts recorded in this case, that the goods in question were really received because without receiving such goods the corresponding sales would not have



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been possible. However, the goods were not received from the parties from whom it is shown to have been purchased but such goods were purchased from different sources which were exclusively within the knowledge of assessee and none else. The invoices produced in support of such purchases were not genuine invoices and entries in relation to such purchase made in the books of accounts are fictitious. But the appellant has not admitted the fact of the bogus purchase invoices. Unless the appellant admits the fact that the payments shown as made by cheques to the bogus suppliers are not genuine, and also that money paid to them when it was withdrawn from the bank was available for making cash purchases, the appellant cannot be allowed credit for cash purchase on the basis of payments recorded in the books of accounts. It is thus concluded that the appellant has paid for such purchases on the date of receipt of material and the source of purchase on the date of receipt is unexplained. However, payment made available for the first purchase can be considered as available for next purchase and peak amount can be worked out to determine unexplained investment in relation to purchase of diamonds from undisclosed parties and undisclosed sources. The AR has computed the peak credit for AY 2009-10 at Rs. 76,20,833/-, for AY 2011-12 at Rs.1,44,32,287/- & for 2012-13 at Rs.77.92.001/-. The AO is directed to verify the peak credit computed by the appellant and restrict the addition to the extent of peak credit after allowing credit for addition made on the basis of peak credit in the immediately preceding year. No addition on account of peak credit would be warranted for AY 2012-13 as the peak credit for the AY at Rs. 77.92.001/- is less than the peak credit for AY 2011-12 at Rs. 1,44,32,287/-.

8.3.24 Further, the motive behind obtaining bogus bills is inflation of purchase price so as to suppress the profits. The profit from such transactions varies with nature of business and no uniform yardstick can be adopted for estimation of such profit.

8.3.25 The estimations of profit embedded in accommodation entries of bogus purchases transactions @ 12.5% out of purchase price accounted through bogus invoices have been upheld as the fair profit rate out of the bogus purchases by the Hon'ble Courts and Tribunals.

8.3.26 In the case of CIT v. Simit P Sheth (2013) 356 ITR 451 (Guj)(HC), the Hon'ble High Court has upheld disallowance @12.5% of such purchases.

8.3.27 The appellant company is a trader in goods i.e. dealers in ferrous and non ferrous metals and under identical facts, the Hon'ble ITAT, Bombay Tribunal (H) has upheld disallowance @12.5% of such purchases in the decision date 4th April, 2017 in the case of Ratnagiri Stainless Pvt. Ltd. vs. Income Tax Officer in ITA No. 4463/Mum/2016 as well as in Income Tax Officer 5 (3) (1) vs. M/s RBS Copper Products Pvt. Ltd. in ITA Nos. 1057 & 1058 dated 04/07/2017.

8.3.28 Thus taking into account the entirety of the facts, the profit embedded in accommodation entries of purchase of diamonds is estimated @ 12.5% of the purchase amount as under:

AY	Purchase Amount	Profit @12.5%	Peak Credit
AY 2009-10	2,46,79,447/-	30,84,9317-	76,20,8337-
AY 2011-12	7,31,94,3717-	91,49,2967-	1,01,72,2137-
AY 2012-13	3,95,76,9627-	49,47,1207-	1,03,52,2897-



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8.3.29 However, the above amounts are treated as subsumed under separate addition as peak credit since the peak credits are more than the profit estimated for the respective years for AY 2009-10 & 2011-12.

For AY 2012-13, the addition of Rs.10,76,907/- to the total income of the appellant, the profit embedded in the accommodation entries, estimated @ 12.5% bogus purchases amounting to Rs. 86,15,2567-, is confirmed. Since no addition has been made by the AO on account of peak credit and no addition on account of the peak credit would be made as the peak credit for AY 2012-13 is less than peak credit for 2011-12.

Accordingly, the Grounds of appeal No. 1, 2 & 4 for AYs 2009-10 & 2012-13 are partly allowed and Grounds of appeal No.1 & 3 for AY 2012-13 are dismissed.

It is evident from the above order that learned CIT(A) was of the view that without receiving the goods, corresponding sales could not have been possible. However, the goods were sourced from different sources which were within the exclusive knowledge of the assessee. Further the assessee had paid for such purchases on the date of receipt of this material and the source of purchase on the date of receipt remained unexplained. Therefore, the payment made available for first purchase could be considered as available for next purchase and peak amount could be worked out to determine unexplained investment in relation to purchases made from undisclosed parties out of undisclosed sources, Since the peak credits for AYs 2009-10, 2011-12 & 2012-13 were worked out by the assessee to be Rs.76.20 Lacs, Rs.144.32 Lacs & Rs.77.92 Lacs respectively, learned AO was directed to verify the same and restrict the addition to the extent of peak credit after allowing credit for addition made on the basis of peak credit in immediately preceding year. In other words, the addition for AY 2009-10 were sustained to the extent of Rs.76.20 Lacs whereas addition for AY 2011-12 were sustained after allowing credit of Rs.76.20 Lacs as sustained in AY 2009-10. No addition was sustained for AY 2012-13 in view



of the fact that the peak credit for this year was less than peak credit for AY 2011-12.

Additionally, learned CIT(A) proceeded to work out estimated addition @12.5% of alleged bogus purchases made by the assessee, to account for inflation of purchase price so as to suppress the profits. However, these estimations for AYs 2009-10 & 2011-12 were treated to have subsumed under peak credit addition since the peak credit was more than estimated addition @12.5%. However, for AY 2012-13, it appears that the learned CIT(A) has upheld addition to the extent of Rs.10.76 Lacs, being 12.5% on alleged bogus purchases of Rs.86.15 Lacs.

The aforesaid adjudication has given rise to cross-appeals before us.

4.1 The Ld. Authorised Representative for Assessee [AR], drawing our attention to the grounds of appeal, submitted that the assessment was framed in gross violation of principle of natural justice as well as in breach of the provisions of Section 142(3) of the Act. It was pleaded that adverse material was never confronted to the assessee and no opportunity of cross-examination was ever provided to the assessee. It has further been pleaded that the additions were made as unexplained investment u/s 69C whereas all the transactions were recorded in the books of accounts and the payment were through banking channels and therefore, there was no unexplained investments made by the assessee within the meaning of Section 69C, as held by learned AO. The Ld. AR also contested the validity of reassessment proceedings by submitting that the proceedings were initiated merely on the basis of information received from DGIT



(investigation) and there was no independent application of mind on the part of Ld. AO to trigger reassessment proceedings. It has also been pleaded that in the absence of any evidence as to recycling of cash back to the assessee, the additions would not be sustainable. Alternatively, Ld. AR pleaded for reasonable additions keeping in view the assessee's nature of business.

4.2 Reliance has been placed on the decision of Hon'ble Supreme Court in **Dhakeshwari Cotton Mills Ltd. V/s CIT [26 ITR 775]** to submit that the adverse material relied upon by Ld. AO to make the additions was not confronted to the assessee. Reliance has been placed on the decision of Hon'ble Bombay High Court in **Pr.CIT V/s M/s Uni Packs Ltd. [ITA No.194 of 2017 dated 30/04/2019]** for the submissions that no independent inquiries were made by Ld. AO and therefore, the additions were not sustainable. Reliance has also been placed on the decision of Hon'ble Gujarat High Court in **Pr.CIT V/s Teju Rohit Kumar Kapadia [ITA No.691 of 2017]** for the submissions that in the absence of any evidence of recycling of cash back to the assessee, the additions would not be justified. Reliance has also been placed on various decisions to submit that estimation was on the higher side. Lastly, reliance has been placed on the decision of Hon'ble Bombay High Court rendered in bunch of appeals titled as **Pr.CIT Vs. M/s Mohommad Haji Adam & Co. [ITA No.1004 & others of 2016, dated 11/02/2019]** for the submissions that estimation may be made at lower rates.



4.3 Per Contra, Ld. DR placed reliance on the decision of Hon'ble Supreme Court rendered in **Raymond Woollen Mills Ltd. v. ITO [236 ITR 34]** to justify the invocation of reassessment proceedings. Reliance has also been placed on the decision of Hon'ble Gujarat High Court rendered in **N.K.Proteins Ltd. Vs. CIT [2016-TIOL-3165-HC-AHM-IT]** to submit that full additions were justified. Our attention has also been drawn to the observations made by learned AO in his order.

5.1 We have carefully heard the rival submissions, perused relevant material on record and deliberated on all judicial announcements as cited before us. We have also applied our mind to the factual matrix as enumerated by us in the preceding paragraphs.

5.2 We find that during assessment proceedings, pursuant to receipt of certain information from DGIT (Investigation), the allegations were levelled by revenue against the assessee that the assessee procured bogus purchase bills from as many as 5 entities. Notices issued u/s 133(6) were issued to these suppliers to confirm the transactions, however, the same remained unserved in all the cases. The assessee was confronted with all those facts and show-caused to produce the suppliers and adduce evidences in support of purchase transactions. However, the assessee could not produce even a single supplier to confirm the transactions and therefore, the initial primary onus casted upon assessee, in this regard, remained undischarged.

5.3 The Ld. AR has pleaded that the reassessment proceedings were triggered merely on the basis of information received from DGIT (Inv.)



without there being any application of mind by Ld. AO. However, upon perusal of reasons recorded as placed on page no. 16-17 of the paper-book, we find that upon receipt of specific information from DGIT (Investigation), Ld. AO formed a belief that certain income escaped assessment in the hands of the assessee. At this stage, nothing more was required on the part of learned AO to trigger reassessment proceedings and there was no requirement under law to establish that income, in fact, escaped assessment before triggering reassessment proceedings against the assessee. Undisputedly, the original return was processed u/s 143(1) and the only requirement to initiate reassessment proceedings was that learned AO had reasons to believe that certain income escaped assessment in the hands of the assessee. This requirement, in our considered opinion, was duly fulfilled, on the given facts and circumstances. For the said conclusion, we draw support from the ratio laid down by Hon'ble Supreme Court rendered in **Raymond Woollen Mills Ltd. v. ITO [236 ITR 34]**.

5.4 So far as the plea that the adverse material was not confronted to the assessee, we find that the reasons recorded by learned AO were duly confronted to the assessee and ample opportunity was provided to the assessee to rebut the allegations levelled by Ld. AO. Nothing on record would suggest that the assessee, during assessment proceedings, ever demanded copies of adverse material or cross-examination of the suppliers. In fact, the primary onus was on assessee to produce the suppliers and substantiate the transactions, particularly in view of the fact that notices



issued u/s 133(6) remained un-responded to and the revenue was in possession of specific information that the assessee procured bogus purchase bills from these suppliers, who admitted to have entered into bogus transactions without supplying any material. This onus, in our opinion, remained undischarged and the conduct of the assessee would not inspire us to subscribe to the pleadings made by Ld. AR, in this regard. The Ld. AR has also submitted that Ld. AO had no jurisdiction to frame the assessment. However, the same are mere submissions without there being any material to support the same. Nothing has been demonstrated before us to establish that learned AO had no jurisdiction to frame the assessment against the assessee. Therefore, we do not find any force in the legal arguments raised by Ld. AR before us. We concur with the observations made by first appellate authority in the impugned order, in this regard. The submissions made by Ld. AR and case laws being relied upon, in this regard, would not come to the rescue of the assessee.

In the result, Ground Nos. 3,4,6 & 7 of assessee's appeal stands dismissed.

5.5 So far as the merits of the case are concerned, we are of the considered opinion that there could be no sale without actual purchase of material keeping in view the fact that the assessee was a trader. The books of accounts were subjected to Tax Audit which contained quantitative details of the items being dealt with by the assessee. The assessee was in possession of primary purchase documents. The payment to the suppliers was through banking channels and the assessee had furnished details of corresponding sales made against the impugned purchases. The sales



turnover reflected by the assessee was not disturbed by the revenue. At the same time, the assessee failed to rebut the allegations levelled by revenue and could not produce even a single party to confirm the transactions particularly in the backdrop of the fact that these suppliers were major suppliers for the assessee and substantial purchases were sourced by assessee from these suppliers. Notices issued u/s 133(6) remained un-responded to in all the cases. Therefore, in such a situation, the addition, which could be made, was to account for profit element embedded in these purchase transactions to factorize for profit earned by assessee against possible purchase of material in the grey market and undue benefit of VAT against such bogus purchases, which lower authorities has rightly done so. However, keeping in view the fact that the assessee was a trader and dealing in low-margin item like metal, which bears a lower VAT rate and also in view of the fact that the assessee had already reflected Gross Profit Rate of 1.71%, the estimation on peak basis as made by learned first appellate authority was on the higher side. We estimate the same @2% of alleged bogus purchases. The same would work out to be Rs.4,93,589/-. The balance additions stand deleted. The Ld. AO is directed to recompute the income in terms of this order. The impugned order stands modified to that extent. The said estimation is in line with the estimation made, under similar factual matrix, in recent decision of the co-ordinate bench of this Tribunal (which has been authored by one of us) rendered in **Sanjay Kumar Mehta V/s ACIT [ITA No. 2898/Mum/2017 order dated 29/08/2019]**, which has been relied upon by Ld. AR.



5.6 For the said conclusion, we also draw strength from the recent decision of Hon'ble Bombay High Court rendered in bunch of appeals titled as **Pr.CIT Vs. M/s Mohommad Haji Adam & Co. [ITA No.1004 & others of 2016, dated 11/02/2019]** wherein Hon'ble Court distinguishing the cited case law of Hon'ble Gujarat High Court rendered in **N.K. Industries Ltd. Vs Dy. C.I.T. in Tax Appeal No. 240 of 2003 and connected appeals decided on 20th June, 2016** observed as under: -

8. In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of **N.K. Industries Ltd. (supra)** cannot be applied without reference to the facts. In fact in paragraph 8 of the same Judgment the Court held and observed as under-

“ So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6 % gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66%. Therefore, considering 5.66% of Rs.3,70,78,125/- which comes to Rs.20,98,621.88 we think it fit to direct the revenue to add Rs.20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favor of the assessee and partially in favor of the revenue.”

9 In these circumstances, no question of law, therefore, arises. All Income Tax Appeals are dismissed, accordingly. No order as to costs.

Resultantly, Ground No. 1 of assessee's appeal stands partly allowed. Ground No.2 becomes infructuous. Ground No. 5 contest levy of interest.



The same being purely consequential in nature, would not require any interference on our part. The assessee's appeal stands partly allowed. The revenue's appeal stands dismissed.

5.7 The Ld. AR has also pleaded that the impugned additions made u/s 69C would not be sustainable under law since the transactions were duly recorded in the books of accounts and the payments were through banking channels. However, as concluded by us in the preceding paras that the material would have been sourced by the assessee from undisclosed sources, the payment against those purchases would also be from undisclosed sources. The transactions reported by the assessee from the tainted supplier and the payment through banking channels could not be held to be more than paper transactions. Therefore, we concur with the conclusion of first appellate authority, in this regard, as made in the impugned order. This plea stands rejected.

5.8 ITA No. 2994/Mum/2018 stands partly allowed whereas ITA No. 3223/Mum/2018 stands dismissed.

Cross-Appeals for AY 2011-12

6.1 Facts are pari-materia the same in this year. The grounds raised are identical in all respect except for change in figures and minor variations. The assessee has been saddled with addition of *alleged bogus purchases* amounting to Rs.731.94 Lacs, on similar lines, in an assessment framed u/s 143(3) r.w.s 147 on 26/02/2014. The impugned order is common order. Facts and Circumstances being identical, our observation, conclusion as well as adjudication as for AY 2009-10 shall *mutatis-mutandis* apply to this



year also. The legal grounds raised by the assessee stands dismissed. The quantum additions stand restricted to 2% of alleged bogus purchases of Rs.7,31,94,371/-. The same comes to Rs,14,63,887/-. The balance additions stand deleted. The assessee's appeal stands partly allowed. The revenue's appeal stands dismissed.

6.2 In this year, the assessee has raised one more additional ground to submit that the additions of Rs.731.94 Lacs made by Ld. AO exceeds the total purchases of Rs.713.97 Lacs made by the assessee during the year under consideration. Since we have restricted the additions to 2%, this ground stand partly allowed.

6.3 ITA No. 2996/Mum/2018 stands partly allowed whereas ITA No. 3224/Mum/2018 stands dismissed.

Assessee's Appeal for AY 2012-13

7. The assessment has been framed u/s 143(3) on 31/03/2015 wherein the assessee has been saddled with estimated additions of Rs.49.47 Lacs, being 12.5% of *alleged bogus purchases* of Rs.395.76 Lacs. The first appellate authority has confirmed the same. From the extraction of impugned order in preceding paragraphs, it appears that Ld. CIT(A) has erred in noting the correct figures since the quantum of *alleged bogus purchases* is Rs.395.76 Lacs and not Rs.86.15 Lacs as wrongly noted by Ld. CIT(A). Nevertheless, facts and circumstances being identical, we restrict the impugned additions to 2% of *alleged bogus purchases* of Rs.3,95,76,962/- which comes to Rs.7,91,539/-. The balance addition stands deleted. The assessee's appeal stands partly allowed.



Assessee's Appeal for AY 2010-11

8. The assessment has been framed for this AY u/s 143(3) on 28/03/2013 wherein the assessee has been saddled with estimated additions of Rs.165.44 Lacs on the basis of peak credit balance and Gross Profit Rate addition. The amount of *alleged bogus purchases* stood at Rs.473.65 Lacs. The first appellate authority has dismissed the appeal ex-parte since the assessee failed to make any submissions. Facts and circumstances being identical, we restrict the impugned additions to 2% of *alleged bogus purchases* of Rs.4,73,65,923/- which comes to Rs.9,47,318/- . The balance addition stands deleted. The assessee's appeal stands partly allowed.

Conclusion

9. ITA Nos. 2994-97/Mum/2018 stands partly allowed whereas ITA Nos. 3223-24/Mum/2018 stands dismissed.

Order pronounced in the open court on 16th September, 2019.

Sd/-

(Saktijit Dey)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 16/09/2019

Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent



Ashok Vakharia HUF
Assessment Years: 2009-10 to 2012-13

3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.