

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” Bench, Mumbai**

**Before Shri S. Rifaur Rahman, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA Nos.1854 & 1855/Mum/2018
(Assessment Years: 2007-08 & 2008-09)**

M/s Dhanera Diamonds
GW-5010 & 5021 To 5023,
Bharat Diamond Bourse,
Bandra Kurla Complex,
Bandra (East)
Mumbai – 400 051

Dy. Commissioner of
Income -tax, Central circle-2(1),
10th Floor, Old CGO Bldg.
Vs. Pratishtha Bhavan, M.K.Road,
Mumbai – 400 020

PAN – AAAFD0634K

(Appellant)

(Respondent)

Appellant by:	Shri K.A. Vaidyalingan, A.R
Respondent by:	Smt. Jothilakshmi Nayak, D.R
Date of Hearing:	16.10.2019
Date of Pronouncement:	23.10.2019

ORDER

PER RAVISH SOOD, JM

The present appeals filed by the assessee are directed against the respective orders passed by the CIT(A)-48, Mumbai, for A.Y. 2007-08 and A.Y. 2008-09, dated 22.01.2018, which in turn arises from the respective assessments framed for the aforesaid years under Sec.143(3) r.w.s 147 of the Income tax Act, 1961 (for short 'Act'). As common issues are involved in the captioned appeals, therefore, the same are being taken up and disposed off together by way of a consolidated order. We shall first advert to the appeal of the assessee for A.Y. 2007-08. The impugned order has been assailed by the assessee on the following grounds of appeal before us:

- “1. The learned CIT(A) erred in upholding the validity of the reassessment proceedings u/s. 147 as there was no failure on the part of the Appellant to disclose fully and truly all material facts necessary for its assessment for the year, which was originally completed u/s. 143(3) after

verification of all the aspects and therefore reassessment in nothing but change of opinion which cannot be the basis for reopening of the already concluded assessment.

2. On the facts and in the circumstances of the case, the learned CIT (A) erred in upholding the addition made by the learned A.O. of Rs. 1,98,42,122/- which is made purely on suspicion, surmises and conjectures and even though all evidences in support of the impugned purchases from M/s. Avi Exportds, M/s. Moulimani Impex P Ltd., M/s. Sparsh Exports P Ltd., M/s. Sun Diam & M/s. Vitrag Jewels were filed and the entire payments were made through banking channels.
3. On the facts and in the circumstances of the case, the learned CIT (A) erred in upholding the addition made by the learned A.O. of Rs. 1,98,42,122/- on the alleged bogus purchase from these parties without furnishing a copy of the statements of these parties on which the learned AO has relied for making the impugned addition.
4. On the facts and in the circumstances of the case the learned CIT(A) erred in upholding the addition made by the learned A.O. even though the statement given by Shri Bhanwarlal Jain on which heavy reliance was placed by the learned A.O. for the impugned addition was retracted by him and therefore, the same has no evidentiary value.
5. On the facts and in the circumstances the case the learned CIT(A) erred in not following the binding judicial pronouncements on the subject on identical facts and circumstances and upholding the addition made by the learned AO.
6. The learned CIT(A) erred in upholding the addition made by the learned AO without giving an opportunity to the appellant to cross examine Shri Bhanwarlal Jain based on whose statement, the impugned addition was made.
7. On the facts and in the circumstances of the case, the learned CIT(A) erred in upholding the addition of 8% of the alleged bogus purchase without appreciating and completely ignoring the fact that even the report of the Govt. appointed Task Group for Diamond Sector to the Department Commerce has stated that the Net profit in this industry is to the tune of '1.5% to 4.5% (manufacturing) and 1% to 3% (trading).

The Appellant prays that (a) the reassessment proceedings be quashed or in the alternative, the addition sustained by the learned CIT(A) being 8% of the impugned purchases be deleted in toto or in the alternative be reduced substantially considering the costly nature of the goods involved.

The appellant craves leave to add, amend, alter, amplify, modify or withdraw any of the grounds of appeal."

2. Briefly stated, the assessee firm which is an importer, manufacturer, exporter and reseller of diamonds had e-filed its return of income for A.Y. 2007-08 on 30.10.2007, declaring its total income of Rs.7,78,97,205/-. Subsequently, the case of the assessee was reopened under Sec.147of the Act.

3. During the course of the assessment proceedings it was observed by the A.O that the assessee had claimed to have made purchases from the following tainted parties:

Sr. No.	Name	Amount
1.	Avi Exports	Rs. 11,49,642/-
2.	Moulimani Impex Pvt. Ltd.	Rs. 8,19,88,783/-
3.	Sparsh Exports Pvt. ltd.	Rs. 2,50,56,915/-
4.	Sum Diam	Rs.11.56,73,173/-
5.	Vitrag Jewells	Rs. 2,41,58,017/-
	Total	Rs.24,80,26,530/-

In order to verify the veracity of the aforesaid purchase transactions, the A.O called upon the assessee to place on record the documentary evidence substantiating the authenticity of the said transactions. In reply, the assessee furnished the details of the purchases made from the aforesaid parties along with details of the corresponding sales accounted for in the 'books of accounts', copies of purchase invoices alongwith the corresponding export sale invoices, copy of bank advices reflecting the payments made to the aforesaid parties towards purchase consideration and the amount received against the corresponding export sales, and also the confirmations of the aforesaid parties. It was the claim of the assessee, that it had made genuine purchases against "H forms" from the aforesaid parties, which thereafter were exported as per the details placed on record. In order to verify the authenticity of the purchase transactions the A.O issued notices under Sec.133(6) to all of the aforementioned parties, which were duly complied with by them and the requisite details were furnished with the A.O. However, as the assessee had failed to produce the parties before the A.O along with their books of accounts, therefore, the A.O declined to accept the genuineness of the impugned purchase transactions under consideration. At the same time, it was observed by the A.O, that the sales corresponding to the aforesaid purchases had duly been accounted for by the assessee in its 'books of accounts'. In the backdrop of the aforesaid facts, the A.O characterising the aforesaid unsubstantiated purchase transactions as bogus transactions made an addition of 8% of the aggregate value of the impugned purchases of Rs. 24,80,26,530/-. Resultantly, after making an addition of Rs.1,98,42,122/-, the income of the assessee firm was assessed at Rs.9,77,39,327/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). However, the CIT(A) after deliberating on the contentions advanced by the assessee was not persuaded to subscribe to the same. It was observed by the CIT(A), that as the assessee had failed to substantiate its claim of having made genuine purchases from the aforementioned parties, therefore, it could safely be held that the assessee had procured the goods at a discounted value from the open/grey market. On the basis of his aforesaid deliberations, the CIT(A) holding a strong conviction that no infirmity did emerge from the order of the A.O, upheld his order and dismissed the appeal.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Authorised Representative (for short 'A.R') for the assessee took us through the facts of the case. It was submitted by the Id. A.R, that as instructed, the Ground of appeal No. 1 wherein the validity of the jurisdiction assumed by the A.O u/s 147 of the Act was assailed, is not being pressed. In the backdrop of the aforesaid concession of the Id. A.R the **Ground of appeal No. 1** is dismissed as not pressed.

6. As regards the merits of the case, though the Id. A.R did not rebut the observations of the lower authorities as regards characterisation of the purchase transactions as bogus by the lower authorities, but at the same time, it was submitted by him that sustaining of the addition to the extent of 8% of the aggregate value of the purchase transactions by the CIT(A) was highly exorbitant. It was submitted by the Id A.R, that the Hon'ble High Court of Bombay in its recent judgment in the case of Pr. CIT-17 vs. M/s Mohhomad Hazi Adam & Co. (ITA No.1004 of 2016, dated 11.02.2019) , had observed, that the addition in respect of purchases which were found to be bogus in the case of the assessee before them, who was a trader, was to be worked out by bringing the G.P rate of such bogus purchases at the same rate of other genuine purchases. The Id. A.R drawing force from the aforesaid judicial pronouncement submitted, that the addition in the case of the assessee on a similar footing was liable to be restricted only to the extent of its GP rate pertaining to its genuine purchases accounted for in its regular 'books of accounts'.

7. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the Id. D.R, that as the assessee had failed to substantiate the genuineness of the purchase transactions to the hilt on the basis of irrefutable documentary evidence, therefore, the A.O had rightly disallowed 8% of the aggregate value of the purchases which were claimed by the assessee to have been made from the aforementioned tainted parties. It was averred by the Id. D.R, that as the lower authorities had in all fairness restricted the addition only to the extent of 8% of the aggregate value of purchases made by the assessee from the tainted parties, therefore, seeking of any further relief by the assessee did not merit acceptance. It was the claim of the Id. D.R that as the appeal of the assessee was devoid and bereft of any merit, therefore, the same was liable to be dismissed.

8. We have given a thoughtful consideration to the facts involved in the case before us in the backdrop of the observations of the lower authorities, and the contentions advanced by the authorised representatives for both the parties. Admittedly, as the assessee had as against the impugned unsubstantiated purchases accounted for the corresponding sales in its 'books of accounts', therefore, the lower authorities had rightly observed that the addition in the hands of the assessee was liable to be restricted only to the extent of the profit which it would have made by procuring the goods at a discounted rate from undisclosed sources operating in the open/grey market. The issue before us is confined only to the quantification of the profit element involved in the impugned purchases made by the assessee from undisclosed parties. Insofar the quantification of such profit element is concerned, we find that the **Hon'ble High Court of Bombay** in its recent judgement in the case of **Pr. Commissioner of Income Tax-17 Vs. M/s Mohomad Haji Adam & Company (ITA No. 1004 of 2016, dated 11.02.2019)** while upholding the order of the Tribunal, had observed, that the addition in the hands of the assessee as regards the bogus/unproved purchases was to be made to the extent of bringing the G.P rate of such purchases at the same rate of other genuine purchases. The Hon'ble High Court while concluding as herein above, had observed as under:

"8. In the present case, as noted above, the assessee was a trader of fabrics. The AO 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 sale 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 trade. 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 favour of the assessee and partially in favour of the revenue."

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

As such, the Hon'ble jurisdictional High Court had observed, that the addition in respect of purchases which were found to be bogus in the case of the assessee before them, who was a trader, was to be worked out by bringing the G.P. rate of such bogus purchases at the same rate of other genuine purchases. We thus respectfully following the aforesaid judgment of the Hon'ble High Court direct the A.O to restrict the addition insofar the bogus/unproved purchases aggregating to Rs.24,80,26,530/- in the case before us are concerned, by bringing the G.P rate on the amount of such bogus purchases at the same rate as that of other genuine purchases. Needless to say, the assessee in the course of the 'set aside' proceedings shall furnish the requisite details before the A.O, who shall after making necessary verifications restrict the additions in terms of our aforesaid observations. The order passed by the CIT(A) is 'set aside' and the matter is restored to the file of the A.O to give effect to our aforesaid directions. **Grounds of appeal No. 2 to 7** are allowed for statistical purposes.

9. The appeal of the assessee is allowed for statistical purposes.

ITA No. 1855/Mum/2018
A.Y. 2008-09

10. We shall now advert to the appeal of the assessee for A.Y. 2008-09. The assessee has assailed the impugned order on the following grounds of appeal before us:

- "1. The learned CIT(A) erred in upholding the validity of the reassessment proceedings u/s. 147 as there was no failure on the part of the Appellant to disclose fully and truly all material facts necessary for its assessment for the year, which was originally completed u/s. 143(3) after verification of all the aspects and therefore reassessment in nothing but change of opinion which cannot be the basis for reopening of the already concluded assessment.
2. On the facts and in the circumstances of the case, the learned CIT (A) erred in upholding the addition made by the learned A.O. of Rs. 1,21,94,483!- which is made purely on suspicion, surmises and conjectures and even though all evidences in support of the impugned purchases from M/s. Avi Exportds, M/s. Moulimani Impex P Ltd., M/s. Sparsh Exports P Ltd., M/s. Sun Diam, Aadi Impex & M/s. Vitrag Jewels were filed and the entire payments were made through banking channels.
3. On the facts and in the circumstances of the case, the learned CIT (A) erred in upholding the addition made by the learned A.O. of Rs. 1,21,94,483!- on the alleged bogus purchase from these parties without furnishing a copy of the statements of these parties on which the learned AO has relied for making the impugned addition.
4. On the facts and in the circumstances of the case the learned CIT(A) erred in upholding the addition made by the learned A.O. even though the statement given by Shri Bhanwarlal Jain on which heavy reliance was placed by the learned A.O. for the impugned addition was retracted by him and therefore, the same has no evidentiary value.
4. In the facts and in the circumstances the case the learned CIT(A) erred in not following the binding judicial pronouncements on the subject on identical facts and circumstances and upholding the addition made by the learned AO.
5. The learned CIT(A) erred in upholding the addition made by the learned AO without giving an opportunity to the appellant to cross examine Shri Bhanwarlal Jain based on whose statement, the impugned addition was made.

6. On the facts and in the circumstances of the case, the learned CIT(A) erred in upholding the addition of 8% of the alleged bogus purchase without appreciating and completely ignoring the fact that even the report of the Govt. appointed Task Group for Diamond Sector to the Department Commerce has stated that the Net profit in this industry is to the tune of '1.5% to 4.5% (manufacturing) and 1% to 3% (trading).

The Appellant prays that (a) the reassessment proceedings be quashed or in the alternative, the addition sustained by the learned CIT(A) being 8% of the impugned purchases be deleted in toto or in the alternative be reduced substantially considering the costly nature of the goods involved

The appellant craves leave to add, amend, alter, amplify, modify or withdraw any of the grounds of appeal.”

11. Briefly stated, the assessee firm had e-filed its return of income for A.Y. 2008-09 on 28.09.2008, declaring its total income at Rs.6,48,84,040/-. The assessment under Sec.143(3) was completed on 31.12.2010, determining the total income of the assessee at Rs.6,62,36,210/-. Subsequently, on the basis of information received from the investigation wing of the Income Tax Department that the assessee had obtained accommodation entries from certain hawala parties, its case was reopened under Sec.147 of the Act.

12. In the course of the assessment proceedings it was observed by the A.O that the assessee had claimed to have made purchases from the following tainted parties:

Sr. No.	Name of hawala Dealer/Accommodation Entry Provider	Amount (Rs.)
1.	Vitrag Jewel	79,29,441/-
2.	Sundiam	3,23,66,839/-
3.	Sparsh Exports Pvt. Ltd.	2,30,42,272/-
4.	Moulimani Impex Pvt. Ltd.	2,69,91,760/-
5.	Avi Exports	4,47,57,088/-
6.	Aadi Impex	1,73,43,638/-
Total		15,24,31,038/-

As the assessee failed to substantiate the genuineness and veracity of the purchases claimed to have been made from the aforementioned parties to the satisfaction of the A.O, therefore, he characterised the corresponding purchases as bogus purchases. At the same time, taking cognizance on the part of the fact that the assessee had duly accounted for the corresponding sales in respect of the impugned purchase transactions in its regular books of accounts, the A.O confined the addition to the extent 8% of the aggregate value of the impugned purchases of Rs.15,24,31,038/- and made a consequential addition of Rs.1,21,94,483/-.

13. Aggrieved, the assessee carried the matter in appeal before the CIT(A). However, not finding favour with the contentions advanced by the assessee, the CIT(A) upheld the addition made by the A.O and dismissed the appeal.

14. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We find that as the facts and the issue involved in the present appeal remains the same as were there before us in the appeal of the assessee for the immediately preceding year, i.e. A.Y. 2007-08 in ITA No. 1854/Mum/2018, therefore, our order therein passed shall apply *mutatis mutandis* for the purpose of disposal of the present appeal of the assessee for A.Y. 2008-09 i.e ITA No. 1855/Mum/2018. Accordingly, in terms of our aforesaid observations recorded while disposing off the appeal of the assessee for the preceding year i.e A.Y. 2007-08, the A.O is directed to confine the addition in respect of the bogus/unsubstantiated purchases by bringing the G.P rate of such purchases at the same rate as that of other genuine purchases. The **Grounds of appeal Nos. 2 to 7** raised by the assessee are allowed for statistical purposes.

15. The appeal of the assessee is allowed for statistical purposes.

16. Resultantly, both the appeals of the assessee are allowed for statistical purposes.

Oder pronounced in the open court on 23.10.2019

Sd/-

(S. Rifaur Rahman)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 23.10.2019

PS. Rohit

Sd/-

(Ravish Sood)
JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai

