

IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH MUMBAI

BEFORE SHRI C.N.PRASAD, JUDICIAL MEMBER

&

SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA No.6520 & 6521/Mum/2018

(Assessment Years: 2009-10 & 2011-12)

Mr.Chirag J Mehta (Proprietor of Navpad Chemicals) 103A, Nadia Apartment, 10 <sup>th</sup> Road T.P.S. III, Santacruz (East) Mumbai-400 055	Vs.	ACIT,Circle-19(2) Piramal Chambers Lalbaug, Parel Mumbai-400 012
<b>PAN/GIR No.AGKPM6888Q</b>		
<b>Appellant)</b>	..	<b>Respondent)</b>

Assessee by	Shri. Ishwer Prakash Rathi & Ms. Pramita Ishwer Rathi, AR's
Revenue by	Shri. Kumar Padmapani Bora, DR
<b>Date of Hearing</b>	<b>13/12/2019</b>
<b>Date of Pronouncement</b>	<b>14/02/2020</b>

**आदेश / O R D E R**

**PER G.MANJUNATHA, Accountant Member:**

These two appeals filed by the assessee are directed against order of the Ld. Commissioner of Income tax (Appeals)-34, Mumbai, dated 28/08/2018 for the AY 2009-10 & 2011-12. Since, facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed-off by this consolidated order.

2. The assessee has more or less raised common grounds of appeal for both AY's. Therefore, for the sake of brevity, grounds of appeal filed for AY 2009-10 are reproduced as under:-

1. *On the facts and circumstances of the case and in law, the Hon'ble Commissioner of income Tax (Appeals) ['CIT(A)'] has erred in upholding the reopening of assessment done by the learned Assessing Officer ('AO') u/s 147 of the Act.*

2. *On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in upholding the disallowances of Rs. 87,61,453/-, being the total amount of purchases from alleged bogus parties, without considering the fact that the Appellant is a trader and the sales against such purchases made by the Appellant have not been disputed.*

3. The brief facts of the case are that the assessee is an individual and proprietor of M/s Navpad Chemicals is engaged in the business of whole seller and reseller in Dyes, Chemicals & Pharma Items, filed his return of income for AY 2009-10 on 25/09/2009, declaring total income at Rs. 6,95,124/-. A survey operation u/s 133A of the Act, was carried out on 04/12/2012 in the business premises and godown of the assessee. During the course of survey, it was observed that the assessee was involved in dealing with parties, who were issuing bogus purchase bills in order to reduce the taxable profits. During the course of survey, a statement of the assessee was recorded on oath, where he had admitted of having taken accommodation entries of bogus purchases bills from various parties in order to reduce its profits and accordingly, admitted to disclose additional income on account of suppression of profits by inflating the purchase for AY 2009-10,2010-11 & 2011-12. Consequent to survey operations, the case has been reopened u/s 147 of the I.T.Act, 1961, for the reasons recorded, as per which income chargeable to tax had been escaped assessment. In response to notices u/s 148, the assessee has been filed revised return of income on 01/01/2013, declaring total income of Rs. 94,56,577/-, incorporating unexplained expenditure on account of bogus purchases. The case has been selected for scrutiny and the

assessment has been completed u/s 143(3) r.w.s. 147 of the I.T.Act, 1961 on 14/03/2014, determining the total income at Rs. 94,56,577/- by accepting income declared by the assessee in revised return filed in response to notice u/s 148 of the I.T.Act, 1961.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has challenged the assessment proceedings, in light of certain judicial precedents, including the decision of Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd.vs CIT(2003) 259 ITR 59 and also, on the ground of 'change of opinion'. The assessee had also challenged the additions made by the Ld. AO towards disallowances of bogus purchases, on the ground that merely on the basis of admission in statement recorded during the survey proceedings u/s 133A, additions could not be made, when the assessee has filed necessary evidences to prove purchases from those parties are genuine and also, in absence of any observations with respect to incorrectness in books of accounts or sales outside in books of account. The Ld. AO has accepted sales declared by the assessee and hence, the entire purchases cannot be treated as income under any pigment of imagination. In this regard, he relied upon various judicial precedents, including the decision of Hon'ble Supreme Court in the case of CIT vs. S.Kaderkhan Sons (2013) 352 ITR 480.

5. The Ld.CIT(A) after considering the relevant submissions of the assessee and also by relied upon the decision of Hon'ble Supreme Court, in the case of ACIT vs Rajesh Jaweri Stcok Brokers ( 291 ITR 510) rejected legal grounds taken by the assessee

challenging reopening of assessment, on the ground that there is a fresh tangible material in form of information gathered during the survey proceedings conducted u/s 133A coupled with information received from DGIT(Inv.), which suggests escapement of income, on account of obtaining accommodation entries of purchase bills, which is sufficient to form reasonable belief of escapement of income within the meaning of section 147 of the I.T.Act, 1961. He, further noted that although, the assessee has cited the decision of the Hon'ble Supreme Court, in the case of GKN Driveshafts (India) Ltd. vs ITO (supra), but fact remains that the assessee never asked for reasons recorded for reopening of assessment at any time, during the assessment proceedings and also, has not filed any objections for reopening. Therefore, it is incorrect to say that the procedure laid down by the Hon'ble Supreme Court in the above case is not followed by the Ld. AO. As regards, additions made by the Ld. AO towards unexplained expenditure being bogus purchases, the Ld.CIT(A) observed that it is a fact of matter, as per assessment order of the Ld. AO, not a single penny has been added to the return of income filed in response to 148 notices issued for reopening of assessment and thus, there cannot be any cause of grievance and such appeal does not survive as per the provisions of section 246 of the I.T.Act, 1961. He, further noted that it is not a case that bogus bills have been obtained from suspicious dealers and corresponded materials have been purchased from the grey market. The assessee himself has admitted that such bogus bills have not only been obtained, but also various expenditure has been booked in order to reduce the taxable profit. Further, the assessee has filed revised return and incorporated admission of income on account of suppression of profits by booking bogus purchases and accordingly,

there is no error in the findings recorded by the Ld. AO for making additions towards disallowances of purchases and accordingly, affirmed the findings of the Ld. AO and dismissed appeals filed by the assessee. Aggrieved by the Ld.CIT(A) order, the assessee is in appeal before us.

6. The Ld. AR for the assessee, at the time of hearing submitted that he do not want to press ground No.1 taken by the assessee challenging validity of reassessment initiated u/s 147 of the I.T.Act, 1961 and hence, the ground No.1 of assessee appeal has been dismissed as not pressed.

7. The Ld. AR for the assessee submitted that the Ld.CIT(A) has erred in upholding the disallowances of Rs. 87,61,453/-, being total amount of purchases from alleged hawala/suspicious dealers, without considering the fact that the assessee is a trader and the sales against such purchases have not been disputed by the Ld. AO. The Ld. AR, further submitted that no doubt, the assessee has admitted of being taken accommodation bills of bogus purchases during survey operations conducted u/s 133A and also, admitted additional income in the statement recorded on oath. But, fact remains that such statement was recorded under coerce and undue influence and accordingly, he was compelled to admit additional income on the basis of advise of the survey team. The Ld. AR, further submitted that there is no estoppels against law, even if assessee admitted certain income or not claimed deductions for certain expenditure by mistaken of facts or law, then the Ld. AO is bound to advise the assessee and compute correct total income and tax payable for the relevant period. Therefore, even if the assessee

had admitted additional income in the revised return filed for the year in response to 148 notices, it can claim relief during the appeal proceedings and accordingly, it has made a fresh claim before the Ld.CIT(A), but the Ld.CIT(A) has rejected arguments of the assessee only on the ground that there is no addition made by the Ld. AO towards bogus purchases and what was done is accepted return filed by the assessee without making any additions towards total income declared in the revised return. The Ld. AR, further submitted that the law is very clear, insofar as, addition on the basis of admission as per which no additions can be made only on the basis of statement recorded during the course of survey, if such admission is not corroborated by necessary supporting evidences. In this case, there is no iota of evidences, either in survey proceedings or during the assessment proceedings of any evidences, which suggest accommodation entries except the statement of the assessee during the survey. The Ld. AR, further submitted that the issue involved in the appeal is well settled now by the decisions of various High Courts and Tribunal, where the jurisdiction Tribunal has constantly held that in case of bogus purchases only profit element embedded in such purchases needs to be taxed, but not whole purchases, from the so called hawala/suspicious dealers. In this regard, he relied upon various judicial precedents, including the decision of Hon'ble Gujarath High Court, in the case of Simit P.Sheth vs CIT (356 ITR 451) The assessee had also relied upon the decision of Hon'ble Bombay High Court, in the case of Mohommad Haji Adam & Co. Ors.vs PCIT in support of his arguments that additions, if any is required to be made, then it should be restricted to gross profit declared by the assessee for the year in normal course of its

business on regular sales. The assessee had also relied upon the CBDT instructions No.14, dated 11/04/1955.

8. The Id. DR, on the other hand, strongly supporting order of the Ld.CIT(A) submitted that there is no merit in the arguments of the assessee that admission of additional income is on the basis of coercion and undue influence, because the assessee had himself admitted in statement recorded on oath during the survey proceedings, where it has been categorically admitted of obtained accommodation bills of bogus purchases from suspicious/hawala dealers. Therefore, the assessee cannot now claim ignorance of law, because ignorance of law cannot be a ground for seeking relief in appellate stages. The Ld. DR, further submitted that the assessee had clearly admitted additional income on account of suppression of profits for taking bogus purchase bills and accordingly, filed revised return of income and incorporated additional income offered during the course of survey. Therefore, the Ld. AO, as well as the Ld.CIT(A) have rightly rejected the claim of the assessee and hence, their order should be upheld.

9. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. It is an admitted fact that a long line of authorities established clearly that the assessee is entitled to raise additional grounds not merely in terms of legal submissions, but also additional claims not made in the return filed by it. This legal proposition is clearly supported by the decision of Hon'ble Supreme Court, in the case of Jute corporation Of India Limited vs CIT (1991) 197 ITR 688, Further the Hon'ble Supreme Court, in the case of Goetz India Ltd.vs CIT

(2006) 157 taxmann 01 had also, categorically held that the restriction imposed on the Ld. AO for not admitting fresh claim without filing revised return of income has no application to appellate authorities and the appellate authorities are at liberty to admit additional ground and claims made by the assessee in accordance with law. The Hon'ble Bombay High Court, in the case of CIT vs Prithvi Brokers and Shareholders (2012) 349 ITR 336 (Bom.) clearly held that an assessee is entitled to raise not merely an additional legal submission before the appellate authorities, but is also entitled to raise additional claims before them and the appellate authorities have discretion, whether or not to permit such additional claim to be raised, however, they have no jurisdiction to consider the same. The sum and substance of the ratios laid down by the above judicial precedents is that the assessee can make not only additional ground, but also additional claims without filing revised return of income. In this case, on perusal of facts, it is noted that although, the assessee has made an additional claim towards unexplained expenditure being bogus purchases without filing revised return of income before the Ld. AO, but such claim has been made before the Ld.CIT(A) during the appellate proceedings. Therefore, we are of the considered view that the Ld.CIT(A) was erred in not considering the additional claim made by the assessee and hence, we admit the additional claim and decide the issue in accordance with law.

10. Having said so, let us examine the issue on merits. The assessee has admitted additional income on account of bogus purchases bills purportedly obtained from suspicious/hawala dealers during the survey proceedings us/ 133A, while answering a question in statement recorded on oath. The assessee had also filed revised

return, in response to 148 notice and incorporated additional income offered during the course of survey towards unexplained expenditure being bogus purchases. These are undisputed facts, but fact remains that whether, the claim of the assessee that no additions could be made towards alleged bogus purchases, when the assessee has filed substantial evidences before the Ld. AO during the assessment proceedings and also, such purchases are recorded in books of account, needs to be examined. It is an admitted legal position that the Hon'ble Supreme Court, in the case of S. Khaderkan & Sons vs CIT(supra) has categorically held that section 133A does not empowered any I.T authority to examine any person on oath, hence any such statement has no evidencery value and any admission made during the such statement cannot , by itself, be made the basis for addition. Further, the Hon'ble Kolkata High Court, in the case of Mayank Poddar (HUF) vs WTO(2003) 262 ITR 633, has observed that if, in law an item is not taxable, no amount of admission or misapprehension can make it taxable. The taxability or the authority to impose tax is independent of admission. Neither, there can be any waiver of the right by the assessee and the department cannot rely upon any such admission or misapprehension, if it is otherwise not taxable. Further, the CBDT has issued instruction NO. 14/1955, dated 11/04/1955, where it has emphasized on the rule of the Ld. AO, while framing the assessment, as per which officers of the department must not take advantage of ignorance of an assessee as his rights, it is one of their duties to assist a tax payer in a every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard, the officers should take the initiative in guiding the tax payer, where proceedings or other particulars before them indicate that

sum refund or relief is due to him. Therefore, from the above, it is very clear that even, if assessee admits income or not claimed any deduction for any expenditure by misconception of law or fact, then it is the duty of the Ld. AO to compute the correct total income and tax liability of the assessee. Hence, we are of the considered view that the Ld.CIT(A) was erred in not considering the claim of the assessee towards alleged bogus purchases, merely for the reasons that the assessee has admitted additional income in the statement recorded during the course of survey and further, filed revised return and incorporated additional income.

11. Insofar as, the issue of additions made towards alleged bogus purchases from hawala/suspicious dealers, we find that during the course of survey proceedings u/s 133A or even, during the course of assessment proceedings, the Ld. AO never brought on record any evidences, except the statement of the assessee made during the course of survey to prove that the alleged purchases claim to have been made from certain parties are non genuine. The Ld. AO has solely relied upon the statement of the assessee made, during the course of survey and further, taken support from the investigation carried out by the MVAT department, Government of Maharashtra, where they have initiated action against certain dealers on the sole ground that they are suspicious/hawala dealers. Except, this no further independent enquiry was conducted by the Ld. AO to ascertain the correct nature of transactions between the parties. On the other hand, the assessee has filed necessary evidences before the Ld. AO, including purchases bills, payment details and other relevant details to prove the purchases from the above parties. The assessee had also filed books of accounts maintained for relevant

period, including stock registers ect. The Ld. AO, neither pointed out any discrepancy in books of accounts, nor made out a case of sales outside the books. In fact, the Ld. AO has not disputed sales declared by the assessee for the relevant period. Hence, once sales are not disputed, the corresponding purchases cannot be treated as non genuine under any pigment of imagination and further, only the profit element embedded on such purchases needs to be taxed. This legal proposition is supported by plethora of judicial precedents, including the decision of Hon'ble Gujarat High Court, in the case of Simit P. Sheth (356 ITR 451), where the Hon'ble High Court categorically held that in cases of alleged bogus purchases, only profit element embedded in those purchases needs to be taxed, but not total purchases, because the findings of the authorities below was that the assessee has purchased goods from grey market and to cover-up such purchases has obtained accommodation bills from entry providers. The Hon'ble Bombay High Court in the case of PCIT vs Mohommad Haji Adam & Co. & Ors in (2019) 104 CCH 0391, had considered an identical issue and held that purchases could not be rejected without disturbing sales in case of trader and the court further held that while arrive at conclusion the authorities should estimate gross profit rate on purchases at same rate of other genuine purchases. The ITAT, Mumbai in number of cases had considered an identical issue and after considering the nature of business has consistently held that only profit element embedded in alleged bogus purchases needs to be taxed, when the sales are not doubted by the Ld. AO. In this case, on perusal of records, the assessee is into the business of whole seller and reseller in dyes and chemicals and pharma items. The assessee has declared gross profit of 5.61% to 5.91% for AY 2009-10 to AY 2011-12. Although,

the rate of gross profit declared by the assessee in his books of accounts is not a correct yardstick to determine the profit element in alleged bogus purchases, but if you go through the nature of business of the assessee and industry practice, at any point of time 100% additions cannot be sustained. Further, although the assessee has cited the decision of Hon'ble Bombay High Court in the case of Mohammad Hazi Adam and Company vs PCIT(supra) and requested to scale down additions made by the Ld. AO towards gross profit rate of other purchases, but the claim of the assessee cannot be accepted, because the gross profit declared by the assessee in its regular books of accounts cannot be considered as correct in view of the fact that there is some sort of doubt is still there, in respect of purchases claim to have made from certain parties. Therefore, we are of the considered view that after considering facts and circumstances of this case and consistent with view taken by the co-ordinate bench in number of cases a reasonable amount of profit needs to be estimated of alleged bogus purchase to meet the ends of the justice. Hence, by taking into account over all facts and circumstances of this case and also, consistent with view taken by the co-ordinate bench in similar cases, we direct the Ld. AO to estimate 12.5% profit on alleged bogus purchases.

12. In the result, appeal filed by the assessee for AY 2009-10 is partly allowed.

**ITA No. 6521/Mum/2018:-**

13. The facts and issues involved in this appeal are identical to the facts and issues, which we had considered in ITA No. 6520/Mum/2018. The reasons given by us in preceding paragraphs in IT No. 6520/Mum/2018 shall *mutatis mutandis* apply to this appeal as well. Therefore, for similar reasons, we direct the Ld. AO to estimate 12.5% profit on alleged bogus purchases.

14. In the result, appeal filed by the assessee is partly allowed.

15. As a result, both appeals filed by the assessee are partly allowed.

Order pronounced in the open court on this 14 /02/2020

**Sd/-**  
**(C.N.PRASAD)**  
JUDICIAL MEMBER

**Sd/-**  
**(G. MANJUNATHA)**  
ACCOUNTANT MEMBER

Mumbai; Dated: 14/02/2020  
Thirumalesh Sr.PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai