

**IN THE INCOME TAX APPELLATE TRIBUNAL "G"
BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, AM &
SHRI RAM LAL NEGI, JM**

आयकरअपीलसं./ I.T.A. No. 5334/Mum/2017 &
Cross objection No.– 01/Mum/2019
(निर्धारणवर्ष / Assessment Year: 2009-10)

ACIT – 11(1)(2), Room No. 1, Ground floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020	बनाम/ Vs.	M/s Sanghvi Star Retail Pvt. Ltd. Plot No. 75, C-14, Cross Road, Marol MIDC, Anderi (East), Mumbai- 400 093
स्थायीलेखासं./जीआइआरसं./PAN No. AALCS5646N		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri V. Vinod Kumar, DR
प्रत्यर्थीकीओरसे/Respondentby	:	Shri Suchek Anchaliya, AR
सुनवाईकीतारीख/ Date of Hearing	:	09.10.2019
घोषणाकीतारीख / Date of Pronouncement	:	31.10.2019

आदेश / ORDER

Per S. Rifaur Rahman, Accountant Member:

The present Appeal has been filed by the revenue against the order of Ld. Commissioner of Income Tax (Appeals) - 18 in short referred as 'Ld. CIT(A)', Mumbai, dated 10.04.17 for Assessment Year (in short AY) 2009-10.

2. Brief facts of the case are, the assessee is engaged in trading of diamond, manufacturing and trading of diamond studded jewellery. Assessee filed return of income for the assessment year 2009-10 on 30.09.2009 declaring total income of Rs. 1,34,93,087/-the written was processed under section 143 (1) of the act. Subsequently the case was selected for scrutiny under section 143 (3) and the same was completed on 16.12.2011, assessed that total income at Rs. 1,37,69,020/-.

3. Subsequently assessing officer received information from Sales tax authorities about the accommodation entries provided by M/s Amaya Enterprises, M/s Dev Enterprises and M/s N B Enterprises to the extent of Rs. 4,70,967/-. In order to verify the purchases, assessing officer asked the assessee to submit the relevant document in support of the above purchases, at the same time he issued notices under section 133 (6) of the act to the above said parties. There was no response from those suppliers and assessing officer relying on the information from sale tax department and also assessee failed to bring the suppliers or onus to prove that the purchases were genuine. The assessing officer

made the addition hundred percent of the purchases made from these suppliers.

4. Similarly assessing officer received information from DGIT (investigation) regarding accommodation entries provided by M/s Prime Star and M/s Daksh Diamonds to the extent of Rs. 95,74,402/-. Assessing officer noticed that this information was received consequent to the search and seizure operation undertaken u/s 132 of the act in the case of Bhanwarlal Jain Group on 3.10.2013. In order to verify the genuineness of the transaction, assessing officer issued notices to assessee as well as notice u/s 133 (6) to the above suppliers. Since the notices were returned unanswered and not satisfied with the submissions of the assessee, assessing officer relying on the sale tax department investigation and subsequent cancellation of the registration of the above parties by the sale tax department, assessing officer disallowed the entire purchases from these parties.

5. Aggrieved with the above order, assessee preferred an appeal before Ld. CIT(A)-18, Mumbai. Before him, assessee made a detailed submission in support of the contention that the

purchases were genuine and due to lapse of time, the suppliers were untraceable and assessee relied various case law in support of its contention which is reproduced by learned CIT(A) in his order at page 10 to 25. After considering the submissions of the assessee, Ld. CIT(A) agreed with the assessing officer that the assessee could not substantiate the genuineness of the purchases and the suppliers were also untraced. However Ld CIT(A) by relying on various case law substantiated the claim of the assessing officer and observed that no doubt the purchases may have been made from bogus parties nevertheless the purchases themselves were not bogus since the assessing officer has not doubted the quantity of purchase or consumption of the material by the assessee. By relying on the decisions of Hon'ble Gujarat High Court in the case of **Bholanath Polyfab Pvt Ltd (355 ITR 290) and CIT vs Simit Sheth (2013) 38 taxmann.com 385 (GUJ)**, it is held in the above cases that since the purchases were not bogus, but were made from parties other than those mentioned in books of accounts, but the profit element embedded in such purchases could be added to the assessee's income and as such no question of law arose in such estimation. With the above

observation Ld CIT(A) came to conclusion in the following paragraphs by sustaining 3% of the purchase value:

3.4 In response to the same, the appellant relied on certain judicial pronouncements, contended that the purchases were genuine and authentic transactions. The appellant stated before the Assessing Officer that as the alleged purchases are almost over 5 years, it is not practically possible for the appellant to obtain confirmation from them or to trace these one-time parties. In order to verify the genuineness of the impugned transactions, notice u/s. 133(6) of the Act was issued asking the parties concerned to furnish requisite details in support of the purchase allegedly made by the appellant from them. However, there was no compliance from any of the parties.

5. Aggrieved with the above order, the revenue is in appeal before us raising following grounds of appeal:

- 1. "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition of Rs.92,87,364/- on account of bogus purchases without appreciating the fact that the assessee has failed to produce any supporting evidence in the form of identify and genuineness of the*

transactions, it is incumbent on the assessee to produce the party alongwith necessary documents in order to establish the genuineness of the transaction."

2. *"On the facts and in the circumstance of the case and in law, the learned CIT(A) erred in ignoring the decision of the Hon'ble Punjab and Haryana High Court in the case of J.R. Solvents Industries Pvt Ltd (2012) (22 taxmann.com 115) wherein it was held that where purchases were made from a non-existing seller, same would be held to be bogus even if complete quantitative details of purchases were available in the assessee's books of accounts."*
3. *"Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not considering the latest decision of apex court in the case of N.K Protenins Ltd . Vs DCIT 2017(1) TMI 1090- Supreme Court in which 100% of bogus purchases are disallowed?"*
4. *"The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the A.O be restored."*
5. *"The appellant craves leave to amend or alter any ground or add a new ground which may be necessary*

6. Before us learned DR referring to the grounds of appeal brought to our notice findings of assessing officer in Para 2 to Para 3 of the assessment order and further brought to our notice page 25 of CIT(A) order in which Ld CIT(A) gave his decision which he submitted are not in line with the facts of the case. Further he relied in the case of N.K Proteins and his written submission, which is reproduced below:

A-In the above case, it is humbly submitted that the following decisions may kindly be considered with regard to cross examination of witnesses:

1. ITO Vs M. Pirai Choodi ([2012] 20 taxmann.com 733 (SC)/[2011] 334 ITR 262 (SC)/[2011] 245 CTR 233 (SC) (Supreme Court)

where Hon'ble Supreme Court held that order of assessment passed without granting an opportunity to assessee to cross-examine, should not have been set aside by High Court; at most, High Court should have directed Assessing Officer to grant an opportunity to assessee to cross-examine concerned witness

2. M/s Pebble Investment And Finance Ltd Vs ITO [2017-TIOL-238-SC-IT1 (Supreme Court)

where Hon'ble Supreme Court held as follows:

"so far as request for cross examination is concerned, we find that Assesses, during the first round of proceedings before the AO did not raise any such issue. At that point of time, the person who made the statement, could have been produced by the AO. It was only in the second round of proceedings when the Assessee was not able to contact the Director of M/s. Omega, that they came up with a request for his cross examination. Therefore, the submission on part of the assessee that the delay has led to it being unable to produce evidence is of no avail as the delay was in seeking cross examination by it."

3. CIT Vs Kuwer Fibers (P.) Ltd. [2017] 77 taxmann.com 345 (Delhi)

where Hon'ble Delhi High Court held as follows:

"As far as the question relating to cross examination is concerned, the court notices that though the documents were furnished to the assessee, it had not sought opportunity of cross examination; this was made at the fag end, in March, 1997. This court finds no justification to reject the statements, which merely explain the documents seized; the assessee could well have given a full explanation instead of seeking

rejection of the documents on the ground that they were prepared in the context of a family dispute leading to a settlement."

4. CIT Vs Sonal Construction [2012-TIOL-851-HC-DEL-IT] (Delhi)

where Hon'ble Delhi High Court held as follows:

"If it (ITAT) had found that there were procedural lapses on the part of the Assessing Officer while making the assessment, the proper course for it would be to not to invalidate the assessment or delete the additions but to remand the assessment to the Assessing Officer so that the procedural lapses which had prejudicially affected the assessee can be set right and the assessment be completed after duly complying with the rules of natural justice. Reference may be made to the recent decision of the Supreme Court in the case of ITO v. M. Pirai Choodi [2011]334 ITR 262/[2012] 20taxmann.com 733"

5. Nokia India (P.) Ltd. Vs DCIT [2015] 59 taxmann.com 212 (Delhi - Trib.)

where Hon'ble ITAT Delhi held that statements were duly provided to assessee during proceedings before Assessing Officer, however, assessee never asked for cross-examination, hence this plea of cross

examination raised at such a later stage of proceedings was not justified.

6. GTC Industries Ltd. Vs ACIT [1998] 65 ITD 380 (BOM)

where Hon'ble ITAT Mumbai held that where statements of witnesses were only secondary and of subordinate material used to buttress main matter connected with amount of additions, it had to be held that there was no denial of principles of natural justice if witnesses were not allowed to be cross-examined by assessee.

B- In the above case, it is humbly submitted that the following decisions may kindly be considered with regard to bogus purchases:

1. N K Proteins Ltd Vs CIT (2017-TIOL-23-SC-IT)

where Hon'ble Supreme Court held that entire undisclosed income generated out of bogus transactions, deserves to be added to total income

N K Proteins Ltd Vs CIT (2016-TIOL-3165-HC-AHM-IT)

where Hon'ble Gujarat High Court held that addition on basis of undisclosed income cannot be restricted to

a certain percentage, when the entire transaction was found as bogus

2. CIT Vs Arun Malhotra 47 taxmann.com 385 (Delhi)/[2014] 363 ITR 195

where Hon'ble Delhi High Court held that where Assessing Officer having found that transaction of purchase and sale were bogus, made addition under section 69A, Tribunal, was not justified in deleting addition without going into evidence on record

3. Viivay Proteins Ltd Vs ACIT [2015] 58 taxmann.com 44 (Gujarat)

where Hon'ble Gujarat High Court held that where assessee inflated expenditure by showing higher purchase price through fictitious invoices in name of 33 fictitious parties, Tribunal was justified in disallowing 25 per cent of purchase price.

4. CIT Vs La Medica [2001] 117 Taxman 628 (Delhi)/[2001] 250 ITR 575 (Delhi)/[2001] 168 CTR 314 (Delhi)

where Hon'ble Delhi High Court held that Assessee having failed to produce evidence to prove bona fides of seller from whom it claimed to have purchased raw material, Assessing Officer treated value of raw

material as assessee's income from undisclosed sources. Once it was accepted that supplies were not made by said supplier to whom payments were alleged to have been made, question of purchases having been made from some other source could not have weighed with Tribunal as a factor in assessee's favour.

5.UDIT KALRA VS ITO WARD 50(1) OF Hon'ble Delhi high court ITA 220/2019&CM No.10774/2019 dated 08.03.2019

6.Pr. C.I.T.(Central)-1 vs NRA IRON & STEEL PVT.LTD. CIVIL APPEAL NO OF 2019 (Arising out of SLP (Civil No.29855 of 2018) SUPREME COURT recent decision dated 05th March 2019

The Hon'ble Supreme court at para 14 has held that the practice of conversion of un -accounted money through the cloak of share capital /premium must be subjected to careful scrutiny. This would be particularly so in the case of Private placement of shares, where a higher onus is required to be placed on the Assessee since the information is within the personal knowledge of the Assessee. The Assessee is under a legal obligation to prove the receipt of the share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the Assessee. Further at para

15 it is held that on the facts of the present case, clearly the Assessee company-Respondent failed to discharge the onus required under section 68 of the Act, the Assessing Officer was justified in adding back the amounts to the assessee's income., and in the last para 16 the Hon'ble Apex court has allowed the appeal of the Revenue set-aside the order of Hon'ble High Court, The ITAT and the CIT and restoring the order of the Assessing Officer.

1. Pr.CIT - 6, New Delhi vs NDR Prompters Pvt Ltd ITA 49/2018 of Hon'ble Delhi High Court dated 17.01.2019

In para 13 of the order the Hon'ble Delhi High Court held that In view of the aforesaid factual position, we have no hesitation in holding that the transactions in question were clearly sham and make-believe with excellent paper work to camouflage their bogus nature. Accordingly, the order passed by the Tribunal is clearly superficial and adopts a perfunctory approach and ignores evidence and material referred to in the assessment order. The reasoning given is contrary to human probabilities, for in the normal course of conduct, no one will make investment of such investment of such huge amounts without being

concerned about the return and safety of such investment. The appeal of the Revenue allowed by the Hon'ble Court.

7. On the other hand, learned AR submitted that assessing officer heavily relies only on sale tax department information whereas he also received information from DGIT (investigation) but assessing officer failed to elaborate the same in his order. With regard to information collected under section 133 (6), he submitted that the assessee was not given proper opportunity for cross examination. He finally submitted that the CO filed by the assessee is on objection of sustaining the addition at 3% of the purchases.

8. Considered the rival submissions and material placed on record, we notice that the AO by relying heavily on the information received from Sales Tax department on the bogus purchases from suppliers of general items and information received from DGIT (Investigation) on the accommodation entries by two diamond suppliers. It is clear from the assessment order and assessment by CIT(A) that all these purchases are no doubt from unsubstantiated suppliers, and it was not proved that

these parties are genuine. We are inclined to accept that these purchase document and suppliers are not genuine. At the same time, it is not brought on record that the purchase itself is not genuine, it is not the case of AO that the assessee has not consumed these materials in the manufacture or trading. AO has merely relied on the information received from Sales Tax Department and DGIT(Investigation) and issued summons to the suppliers and these suppliers were not traceable. He immediately shifted the onus of proof on the assessee and disallowed the whole purchases without any material on record to prove that assessee has not consumed the material in question as assessee has in fact achieved the sales turnover, which is not in disputes by any authorities. Therefore, in order to achieve the turnover, assessee must have purchased the material from other sources and consumed the same in the business. Therefore, it clearly proves that assessee infact purchased the consumed the same. Therefore, we are in agreement with the findings of the Id CIT(A) that purchases are genuine but the not the source of purchases. Therefore, we are inclined to accept the findings of the Ld CIT(A) to make addition only to the extent of profit

element embedded in the above purchases, to the extent of 3% of the purchases.

9. Coming to the submission of the ld DR, he relied on the following case law:

- a. M.Pirai Choodi (supra), in this decision, the Hon'ble supreme court held that the assessment order should not have been set aside but it could have directed the assessing officer to grant an opportunity to assessee to cross examine the concerned witness. Since, we are not setting aside the assessment order but sustaining only the findings of CIT(A), by which we are making addition on embedded margin. Hence this ratio is not applicable in this case.*
- b. Pebble Investment and Finance Ltd (supra), in this case, assessee has not raised the issue of cross examination but made objection only at the second round of assessment proceedings. Accordingly, the hon'ble supreme court dismissed the appeal. This fact is not similar in the present case, as the assessee raises the objection in the proceedings in which the assessing officer makes the addition without giving opportunity to the assessee. The facts are not similar in this case.*
- c. Kuwer Fibers P Ltd (supra), this is also relating to cross examination, in this case, the documents were*

furnished to the assessee, it had not sought opportunity of cross examination but objected only at the fag end of the assessment proceedings. This is not the case in the present case. Distinguishable by facts.

- d. Sonal Construction (supra), in this case, hon'ble Delhi high court held that the procedural lapse can be rectified by remitting the matter back to AO instead of setting aside the assessment order. Since we are not adjudicating the issue on cross examination, it is not applicable.*
- e. The other cases also on cross examination, not applicable.*

On bogus purchases:

- a. N.K Proteins Ltd (supra), it is held that entire undisclosed income generated out of bogus transactions, deserves to be added to total income, we notice that in the given case, it is relating to bogus purchases and in this case, AO, has not established that the purchases itself is not bogus but only the suppliers are bogus. Ld CIT(A) has clearly distinguished the facts and this ratio cannot be applied.*
- b. Arun Malhotra (supra), in this case, both purchase and sales are found to be bogus hence not applicable to the facts of this case.*
- c. Vijay Proteins Ltd (supra), in this case, inflated expenditure by showing higher purchases price*

through fictitious invoices, in this case also, tribunal disallowed 25% of the expenses which found to be excessive. Similarly in this case also CIT(A) has disallowed 3%, as the same was found to inflated in the purchases.

d. The other case law relied are not relevant and distinguishable on facts.

10. Coming to the CO filed by the assessee, Ld. AR relied on following case law to submit that the whole disallowance should be deleted, they are:

- a. Diagold Designs Ltd,*
- b. Vama International*
- c. Sanghavi Exports International P Ltd.*

11. In the above cases, the assessing officer has not substantiated that the purchases were bogus as well as the addition was made merely relying on the information from other agencies and without making proper investigation. Therefore, additions were deleted. Whereas in this case, the assessing officer made the investigation and proved that the suppliers were not traceable. Hence cannot be relied upon and

distinguishable on facts. Accordingly, grounds raised in CO and case laws relied on by assessee are dismissed.

13. In the net result, the appeal filed by the revenue and CO filed by the assessee are **dismissed**.

Order pronounced in the open court on 31st Oct, 2019.

<i>Sd/-</i> (Ram Lal Negi) न्यायिकसदस्य / Judicial Member मुंबई Mumbai; दिनांक Dated : <i>Sr.PS. Dhananjay</i>	<i>Sd/-</i> (S. Rifaur Rahman) लेखासदस्य / Accountant Member 31.10.2019
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

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