IN THE INCOME TAX APPELLATE TRIBUNAL "D"
BENCH, MUMBAI
BEFORE SHRI RAJESH KUMAR, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. Nos.4264/M/2017 & 4265/M/2017
(**निर्धारण वर्ष** / Assessment Years: 2007-08 & 2008-09)

ITO-4(2)(4) Room No.647, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	**बनाम**/ Vs.	M/s. Manek Metal (I) P. Ltd. 262, K-1, Inside Mehta Estate, Thakur Dhwar, Main Road, 2nd Khattar Gali-2 Mumbai-400002.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCM8872A		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Shri Drop Singh Meena (Sr. AR)
Assessee by:	Shri Prateek Jain

सुनवाई की तारीख / Date of Hearing: 31/08/2020
घोषणा की तारीख /Date of Pronouncement: 31/08/2020

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The above mentioned appeals have been filed by the revenue against the order dated 07.03.2017 passed by the Commissioner of Income Tax (Appeals)-9, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Ys.2007-08 & 2008-09.

ITA. NO.4264/M/2017:-

2. The revenue has filed the present appeal against the order dated 07.03.2017 passed by the Commissioner of Income Tax (Appeals)-9,

Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2007-08.

3. The revenue has raised the following grounds: -

> *"1 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to delete the addition made on account of bogus purchases of Rs,1,02,60,150/- u/s 37(1) of the I. T. Act, 1961.*
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> *2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the facts of the case that the assessee failed to prove identity, genuineness and creditworthiness of the entities, who invested as Share Application Money in the assessee company.*
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> *3. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

4. The brief facts of the case are that the assessee filed its return of income on 18.10.2007 declaring total income to the tune of Rs.Nil. The return was processed u/s 143(1) of the I.T. Act. The assessee is a Manufacturer & Exporter of Stainless Steel, Utensils. An information was received on 12.03.2013 from the O/o Dy. DIT (Inv.), Unit-1(2), Mumbai in which it was conveyed that the assessee has taken the bogus purchase entries from the eight entities in sum of Rs.39,78,97,166/- for the F.Y.s 2005-06 to 2012-13. The discrepancy in purchases from the following parties was noticed in the A.Y.2007-08.

Sr. No	Name of the purchase party	Amount
1	Champion Steel Party	31,71,775
2	Chirag Steel India	14,43,512
3	Dhanera Metal Corporation	63,25,999
4	Manish Industrial Corporation	79,25,682
5	PM Steel & Alloys	1,11,33,964

6	Shubham Metal Corporation	28,27,573
7	Devang Metals	1,08,64,251
8	Sunrise Enterprises	27,86,576
		4,64,79,332

5. Based upon the information, the case of the assessee was reopened by issuance of notice u/s 148 of the Act. Thereafter, the notices us/ 143(2) & 142(1) of the Act were issued and served upon the assessee. The notices u/s 133(6) were issued to the alleged parties on their address which were received back un-served with the postal remarks of left/not known. Thereafter, the notice was given to the assessee and after the reply of the assessee, peak credit in sum of Rs.1,02,60,149/- was added to the income of the assessee. The total income of the assessee was assessed to the tune of Rs.1,02,60,150/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who deleted the addition, therefore, the revenue has filed the present appeal before us.

ISSUE NOs.1 & 2

6. Issue nos. 1 & 2 are inter-connected, therefore, are being taken up together for adjudication. In fact, both the issues are in connection with the deletion of addition of bogus purchase in sum of Rs.1,02,60,150/- u/s 37(1) of the I. T. Ac, 1961. At the very outset, the Ld. Representative of the revenue has argued that the CIT(A) has wrongly deleted the addition specifically in the circumstances when the assessee failed to confirm the purchase and the AO also verified the claim of the assessee on account of this fact that the notices were issued u/s 133(6) of the Act which were not served upon the seller. It is also argued that the CIT(A) did not give any reason to delete the addition, therefore, the finding of the CIT(A) is not

justifiable, hence, is liable to be set aside. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. Before going further, we deem it necessary to advert the finding of the CIT(A) on record: -

> *''6.3.1. 1 have considered the stand of the AO in the assessment order as well as the submission of the appellant. The appellant is engaged in the business of manufacturing of stainless utensils. It has been explained that the sales mainly comprise of exports which is almost 99% of the total sales. The said sales are well supported by the documents of exports and hence, there is no doubt about the same. The said fact has been accepted by the AC) and has raised no dispute as to sales. in respect of purchases and manufacturing of the goods is concerned the appellant has submitted various details. It has been explained by the 1.d.AR that the details show that the appellant has been maintaining stock records which shows the quantity of goods purchased, consumed and stock in hand and the valuation thereof. The 'Fax Audit Report confirms the same. The stock statements have been regularly submitted to the banks and are subject to verification by third party agencies. The appellant has also been maintaining records of scrap generated and the shown sales of scrap. The books of account have been audited and that there is no adverse finding in the assessment order to that effect. The appellant has its own transport vehicle to facilitate transport of goods from one place to another as the appellant main business is that of exports.*
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> *6.3.2. In respect of purchases from the bogus parties the appellant has submitted details of purchases along with payment details. The goods purchased are reflected in the stock records. The payment made to the said eight parties is reflected in the bank statements against their respective names. It shows that payments have been made in the regular course of business from available funds and that instances of cash deposited against payment made to the bogus parties is not noticed.*
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> *6.3.3. On the face of the records and details submitted there is nothing incriminating that can be drawn to infer that the said transactions is 'Merely-bogus purchases and not genuine. More importantly there no direct evidence which has brought on record by the AO. No nexus has been established as to circulating of funds or that cash was paid to third parties for actual purchase and that cash has been received on issues of cheques.*

6.3.4. Ongoing through the assessment order for the NY 2007-08 it is seen that on receiving information by the DDIT that the appellant is one of party who has made purchases from parties listed on hawala List by the Maharashtra Sales Tax Department open enquiry was conducted by the Officers of the Investigation team by visiting the business premises of the appellant. During the course of enquiry bills of certain parties were impounded. However, there is nothing on record to show that any incriminating details have been found or that adverse facts have been brought on record.

6.3.5. The A.O. has merely based on the information received from the DDIT has formed opinion that the appellant is one of the beneficiaries who has made alleged bogus purchases.

6.3.6. The AO has stated that actual purchase has been made but from third party as against the paper purchases front the said eight parties. That cash has been paid to third parties out of cash received from the said eight parties. The AO has accordingly applied peak theory in order to make disallowance by arriving at the peak balance on account of cash circulation. Ongoing through the working of peak balance what is observed is that is peak outstanding balance in respect of transaction with the said eight parties of purchases and payments made by cheque for the year consideration. the peak balance is in fact maximum balance outstanding for the year under consideration in respect of the said eight parties. The same cannot be said to be peak balance arising out of cash circulation.

6.3.7.1) in the case of Commissioner of Income-tax-1, Mumbai v. Nikunj Eximp Enterprises (P.) Ltd CIT [2015](372 ITR 619)(Bombay) the court has held as under:-

"We have considered the submission on behalf of the revenue. However, from the order of the Tribunal dated 30-04-2010, we find that the Tribunal has deleted the additions on account of bogus purchases net only on the basis of stock statement i.e. reconciliation statement, but also in view of the other frets. The Tribunal records that the Books of Accounts of the respondent assessee have not been rejected. Similarly, the sales have not been doubled and it is an admitted position that substantial amount of sales have been wade to the Government Department i e. Defense Research and Development Laboratory, Hyderabad. Further, there were confirmation letters filed by the suppliers, copies of invoices for purchase; as well as copies of bank statement all of which would indicate that the purchases were fact made. In our view, merely because the suppliers have not appeared before the Assessing Officer or tit CIT(A), one cannot conclude that the

purchases were not made assessee. The Assessing Officer as well as CIT(A) have disallowed the deduction of ca.33 4rbres. on account of purchases merely on the basis of suspicion because the sellers and the cannot been produced before them. We find that the order of the Tribunal is well a reasoned order taking into account all the facts before concluding that the purchases of Rs.133 crores was not bogus. NO fault can be found with the order dated 30-04-2010 of the Tribunal".

6.3.7.ii) The Gujarat High Court in the case of Commissioner of Income-tax-I v. Nangalia Fabrics (P.) Ltd. [2014](220 taxmann 17) the court has held as under:

13. We have considered the rival submissions and the materials placed on record. The purchases are supported by bills, entries in the books of account. payment by cheque and quantitative details Assessing Officer did not find airy inflation in purchase price or inflation in consumption or suppression the production. The addition had been made only on the ground that the parties are not traceable. Assesses had made payment through crossed cheques and assessing officer did no? find that payment made came back to assessee. Assessing Officer has made addition in respect to the outstanding amount as on purchases is 31.3.2001 which has been cleared in the succeeding years. The ratio of the creditor to the purchase normal considering the past records of the assessee. lire creditors were outstanding owing to liquidity as assessee is also required to get credit in respect of sales also. Even otherwise provision of section 68 is no: to amounts representing purchases wade on credit as held in the case of Panchan Doss Jam cited supra. lire addition in bogus purchase cannot to be sustained in full or in part in view of the various cases laws cited by the assessee and in view of the fact that the decision of Vijay Proteins Ltd. and Sanjay Oil cake Industries are not applicable to the facts of the assessee. Assessee case is covered by the decision of Hon'ble Gujarat High court in case of KashiramTextile Mills. In view of the matter, addition made by the assessing officer is deleted. Ground No.1 of A&ssee5 appeal is allowed and ground No.) of Revenue's appeal is allowed and ground No.1 of Revenue's appeal is dismissed."

6.3.7.iil) The jurisdictional ITAT, Mumbai Bench in the case of ACIT v. Shri Ramila Pravin Shah (2015)(ITA No. 5246/Mun/2013) has held that:

If the addition made by the .4.0. as accepted, then C.P. Ratio o' tire appellant during ti4r present A. Y. will become abnormally high and therefore that is not acceptable because it Onus of the A. 0. by bringing adequate material on record to prove that such a high GP. ratio exists in tire nature of business carried out by the appellant.

Further, it has to be appreciated that (i) Payments were through banking channel and by cheque, (ii) Notices coming back, does not mean, those Parties are bogus, they are just denying their business to avoid sales tax/VAT etc, (iii) Statement by third parties cannot be concluded adversely in isolation and without corroborating evidences against applicant. No cross examination has been offered in AO to the appellant to cross examine the relevant parti2. (who are deemed to be witness or approver being used by AO against the appellant) whose name appear in the website www.maltavat.g02).2fl and (v) failure to produce parties cannot be treated adversely against appellant

6.3.7.iv) The Jurisdictional ITAT Mumbai Bench in the case of ITO V. NVs Eagle Impex (FFA No 5697/Mum/2010) has held that:

We have carefully considered the rival contentions perused the finding of the AO and the learned commissioner (Appeals) and the ii to purchases made from the following four findings of tire Assessing Officer and the rd. In the present case, the dispute relates to purchases made from the following four parties.

Sr. No.	*Name of Parties*	*Amount*
1	*M/s. Poonam Enterprises*	*15,29,265*
2	*M/s. Montex Enterprises*	*23,78,600*
3	*M/s. Veera Mercantile P. Ltd.*	*14,59,012*
4	*M/s. Raj Corporation*	*29,17,620*
		82,84,497

In the first round of assessment proceedings, due to non-verification of the identity of the parties, purchase were disallowed by the Assessing Officer. Before the Commissioner (Appeals), various additional evidences were filed which has been discussed in the foregoing paragraphs to substantiate the genuine of the purchases. These additional evidences were rejected Commissioner(Appeals) on the ground that there was no reason cause for not producing the same before the Assessing Officer. Thereafter. in second appeal. the Tribunal, after admitting the additional evidences, as filed by the assessee before the Commissioner (Appeals), remanded the matter back to the file of the Assessing Officer to decide the issue afresh. in the second round, flit assessee, as per the rioting of the Assessing Officer. could not make proper compliance of the notices

and dates of hearing. An averment has bees: made before its by the learned counsel and also in the statement of fuels fled before the Commissioner (Appeals). by the Assessee that all these evidences and documents Irate been filed before the Assessing Officer in the second round. This fact has been admitted by the Commissioner (Appeals) arid the Revenue has also not challenged this aspect of the matter in the grounds of appeal. Thus. it can safely he inferred that all the evidences with regard to the purchase made 0th the aforesaid from parties are also in the record of the Assessing Officer.

12. From the record, it is seen that all the purchases made four parties have been routed through banking payments is with regard to the purchases have made throng/account payee cheques which is not ted. The photocopy of the cheques have also been placed in paper book from Pages 63 to 73. lire copy of the bank statement also shows that the clearance of these cheques brave been made front the assesses bank account. Thus, from these documents. it cannot be held that the transact wits of the purchases are not genuine. The other evidences like sales tax registration certificate and confirmation of accounts by the said parties also prima facie proves the identity of the purchaser. The reassessed has also produced copies of purchase invoices and also the entire details toil/s regard to the purchase and corresponding exports made by the assessee. In this case, the Assessing Officer has dull accepted the sales /export turnover and also (lie gross profit rate. This, inter - alia, means that the assessee must have made purchases during the year under consideration for which there is corresponding the gross profit which is the balancing figure of the opening stock, purchases and direct cost on site and sales and closing stock on the credit side, Iris been accepted by the Assessing Officer. the'? it would be farfetched to perceive that such a huge quantity of purchases have not been made. Further, these evidences with regard to the purchases were there with the Assessing Officer in the second round of proceedings, he could have at least made sonic efforts to enjoy as to whether these purchases have actually been routed through: banking channel i.e., u.re made through account payee cheques or not or whether the sales tax certificates in the name of these four parties are genuine or not, even though the assessee had failed to put up any appearance for him. The primary onus which laid upon the Assessee was discharged. It was upon the assessee that these documents are not genuine. Circe these documents have not been, be held that the entire purchases with these parties are bogus. Thus, front the facts of the case and also in view of the various evidences, as discussed above, we partly order passed by the commissioner (Appeals) and hold that the entire purchases aggregating to 82,84,497, from the four parties are genuine and, therefore, the entire addition made by art!

Assessing Officer and partly by the Commissioner (Appeals) stands deleted. Thus, ground no.1, raised by the Department is dismissed whereas ground no.2, of the Assessee stands allowed.

6.3.7.v) The Jurisdictional ITAT, Mumbai bench recently in the case of ACIT v. Shri Mahesh Shah (ITA No. 5194/Mum/2014) has held that:

4.3.4 On an appreciation of the material on record, it is evident from the order of assessment that it is primarily on the basis of information/details obtained from the Sales Tax Department, Government of Maharashtra that the AO issued the show cause notice to the assessee to explain the said purchases and issued notices under section 133(6) of the Act to the said 12 parties from whom the said purchases were made, to which there was no response. We find that the AO primarily relying on the information obtained from Sales Tax Department, i.e. statements/affidavits given before them by these parties, held the said purchases amounting to '96,45,645/- to be bogus. While it may be true that the said parties did not appear be. There the AO, for whatever reason, the fact remains that the assessee had filed copies of purchase invoices; extracts of stock ledger showing entry/exit of materials, copies of bank statements to evidence that payments for these put-chases were made through normal banking channels, etc. to establish genuineness of the aforesaid purchases. From the record it is evident that the AO has not doubted the sales affected by ITA. No. 5194/Mum/2014 Shri Mahesh K. Shah 7 the assessee and therefore it would be logical to conclude that without corresponding purchases being made, the assessee could not have effected sales.

4.3.5 lit our considered view, the AO has not brought on record any material evidence to conclusively prove that the said purchases an: bogus. Mere reliance by obtained from the Sales Department or on statements/affidavits of the before the Sales Tax these parties did not respond to notices issued under section 133(6) of the Act, would not in itself suffice to treat the purchases as bogus and make in addition under section 69C of the Act. If the AO doubted the genuineness of the said purchases, it was incumbent upon him to cause further inquiries in the matter in order to ascertain the genuineness or otherwise of these transactions. Without causing any further enquiries to be made in respect of the said purchases, the AC) cannot make the addition under section 69C of the Act by merely relying on information obtained from the Sales Tax Department, the statements/ affidavits of third parties, without the assessee being afforded any opportunity of cross examination of those persons for non-response to information called fly under section 13.3(6) of the Act.

4.3.6 In the factual matrix of the case on hand, where the AO foiled to cause any equity to be made to establish his suspicions that the said purchases are bogus, the assessee has brought on record documentary evidences to establish the genuineness of the said purchase transactions, the action of the AO in brushing aside these evidences cannot be accepted. Further the double Bombay High Court in the case of CIT vs. Ashish International ((TA No. 4299 of 2009) (Boot) has held that the genuineness of the statements relied upon by Revenue is not established when the assessee disputes the correctness thereof and has not been opportunity to cross examine these parties. Moreover, when the payments for the said purchases to the said 12 persons is through roper banking channels and there is no evidence brought on record by the AO to establish that the said payments were routed back to the tr5sessee, the addition made by the AO is unsustainable are filed in this View Of ITA No. 5194/Mum/2O14 Shri Mahesh K Shah 8 ours by the decisions, inter alia, the Hon'ble Bond/ay High Court in the cases of Nikunj Eximp Enterprises Pvt. Ltd. (supra) and Ashish International (supra) and the decision of the Coordinate Bench in the case of M/s. Vaman International Pvt. Ltd. ITA. No. 794/Mum/2015 dated 16.21.2016). In this factual and legal matrix of the case on this issue, as discus find no reason for interference in the order of the learned CIT(A) and consequently uphold order deleting the addition of '96,45,645/. made under section 69C of the Act as unexplained expenditure in respect of the aforesaid purchase. Consequently, ground 1 to 4 of the revenues appeal are dismissed.

6.3.7.vi. In the light of the above factual narration, various references and judicial propositions, it can be concluded that the AO has not been able to prove that the purchases made from the said eight parties are bogus and that the same are paper transactions. In fact, as per the opening pan of the assessment order, it is seen that the said information received by the AO was in respect of bogus purchases through bogus purchase bills but finally the AO himself has not brought any material to substantiate that the said purchases were bogus and only paper transactions were done by the appellant. Therefore, the disallowance made by the AO of Rs.1,02,60,149/- is deleted.

In result, these grounds of appeal are to be treated as Allowed."

7. It is not in dispute that the case of the assessee was reopened on the basis of information received from the DIT (Inv.), Unit-1(2), Mumbai by virtue of latter dated 12.03.2013. The doubtful purchase was found in sum

of Rs.39,78,97,166/- for the F.Y.s 2005-06 to 2012-13. The AO issued the notices u/s 133(6) of the Act which were not served. The AO raised the addition on the basis of peak purchase of Rs.1,02,60,149/-. The CIT(A) has deleted the same on the basis of this fact that the assessee's unit was 99% exports unit and the sale was supported by documents of export and stock register confirmed sale and purchase. The Tax Audit Report confirmed the same. The stock statement produced to the banks was subjected to verification of the third party and the assessee was having its own vehicle for transporting of goods from one place to another. The CIT(A) also observed that the AO nowhere brought any substantial material to raise the addition. AO nowhere brought the material on record to prove the fact that the purchase was bogus. The documents relied upon the CIT(A) was already available with the AO which were not considered and discussed. The CIT(A) has considered the all relevant material on record and arrived at this conclusion that the addition is not based upon any material available on record. No distinguishable material has been produced on record which required interfere with the order passed by the CIT(A) in question. Taking into account of all the facts and circumstances, we are of the view that the CIT(A) has decided the issue judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is decided in favour of the assessee against the revenue.

In the result, the appeal filed by the revenue is hereby dismissed.

ITA. NO.4265/M/2017:-

9. The facts of the present case are quite similar to the fact of the case as narrated above while deciding the ITA. No.4264/M/2017, therefore,

there is no need to repeat the same. However, the figure is different. The matter of controversy is also the same. The finding given above in ITA. No.4264/M/2017 is quite applicable to the facts of the present case as mutatis mutandis and accordingly we dismiss the appeal of the revenue.

10. In the result, appeals filed by the revenue are hereby ordered to be dismissed.

Order pronounced in the open court on 31/08/2020

(RAJESH KUMAR)	(AMARJIT SINGH)
लेखा सदस्य **/ ACCOUNTANT MEMBER**	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai दिनांक Dated : 31/08/2020
Vijay Pal Singh/ Sr. PS

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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**