

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI**

**BEFORE SHRI S.RIFAUR RAHMAN (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.5383/MUM/2019
C.O. No.80/Mum/2020
(Assessment Year: 2010-11)**

ACIT – 5(1)(2)
Room No. 568, 5th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai 400 020

Vs. Fancy Diamonds India Pvt.
Ltd., 111 Prasad Chambers,
Opera House, Mumbai
400 004

PAN No. AAACF3325J

(Revenue)

(Assessee)

Assessee by : Shri Himanshu Gandhi, A.R
Revenue by : Ms. Usha Gaikwad, D.R

Date of Hearing : 24/08/2021
Date of pronouncement : 26/08/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-10, Mumbai, dated 10.05.2019, which in turn arises from the order passed by the A.O u/s 143(3) r.w.s 147 of the Income Tax Act, 1961 (for short 'Act'), dated 14.12.2017 for A.Y. 2010-11. The revenue has assailed the impugned order on the following grounds before us:

- “(i). On the facts and circumstances of the case and in law. the Id. CIT(A) erred in restricting the addition to 6% of the bogus purchases as against 12.5% made by the Assessing Officer without appreciating that the assessee failed to establish genuineness of the purchases before the Assessing Officer.
- (ii) On the facts and circumstances of the case and in low, the Id. CIT(A) erred in restricting the addition to 6% of the bogus purchases following the order in

assessee's own case in AY 2013-14 without appreciating that the impugned decision was not disputed due to existing instructions of the CBDT prevailing at that time and that decision was never accepted in principle.

2. The appellant prays that the order of the Ld. CIT(A) be set aside and the order of the AO be restored.
3. The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary."

Also, the assessee is before us as a cross-objector and had objected to the order passed by the CIT(A) on the following grounds:

- "1. On the facts and circumstances of the case and law, the Ld. CIT(A) erred in confirming the reopening of the assessment u/s 147/148 which is bad in law and deserves to be quashed.
2. On the facts and circumstances of the case and law, the Ld. CIT (A) erred in confirming disallowance of Rs.6,10,585/- being 6% of suspicious purchases amount Rs.93,93,627/-by treating the same as non-genuine.
3. The respondent craves leave to add, alter, amend, modify or delete any of the aforesaid grounds of appeal."

2. Briefly stated, the assessee who is engaged in the business of manufacturing and sale of diamond studded gold jewellery had filed its return of income for A.Y.2010-11 on 24.09.2010, declaring a total income of Rs.17,95,380/- under the normal provisions of the act and 'book profit' of Rs.24,13,576/- u/s 115JB of the Act. The return of income was initially processed as such u/s 143(1) of the Act. On the basis of a search that was way back conducted by the DDIT(Inv.)-II, Ernakulam in the case of one Shri Prateek Mehta and Shri Apoorva Shah on 13/14.12.2011; assessment u/s 143(3) r.w.s 153C, dated 27.03.2014 for the year under consideration was framed in the case of the assessee. Subsequently, on the basis of information received by the A.O from the DGIT(Inv.), Mumbai that the assessee as a beneficiary had obtained bogus purchase bills, its case was reopened u/s 147 of the Act.

3. During the course of the reassessment proceedings it was observed by the A.O that the assessee had claimed to have made purchases of Rs.93,93,627/- from the following two tainted parties:

Sr. No.	Name of Concerns	F.Y.	Amount (Rs.)
1.	Daksh Diamond	2009-10	55,95,826/-
2.	Mayur Exports	2009-10	37,97,801/-
		Total	93,93,627/-

In order to verify the authenticity of the aforesaid purchases the A.O issued notices u/s 133(6) to the aforementioned concerns. Although, one of the concern viz. M/s Mayur Exports submitted its reply through courier, however, no compliance to the notice was made by the other concern. In the backdrop of the aforesaid facts the A.O called upon the assessee to produce the aforementioned parties for necessary examination so that the genuineness and veracity of the purchase transactions in question could be verified. However, the assessee failed to comply with the direction of the A.O and did not produce either of the aforementioned party. On a perusal of the details furnished by the assessee, it was observed by the A.O that the purchase invoices and the delivery challans did not reveal the mode of transportation of the goods in question. Also, it was observed by the A.O that neither the assessee had furnished any reconciliation of the material inflow and outflow nor substantiated its claim of having made genuine purchases from the aforementioned parties by furnishing the requisite quantitative details of purchases recorded in its stock register. Although, the assessee had submitted the purchase bills and the payment details qua the goods which were claimed to have been purchased from the aforementioned parties, it was, however, observed by the A.O that neither the assessee had produced the aforementioned parties for necessary examination nor furnished the complete delivery proof details pertaining to the purchase transactions in question. Backed by the aforesaid facts, the A.O holding a conviction that the assessee had not made any genuine purchases from the aforementioned parties rejected its books of account by invoking the provisions of Sec. 145(3) of the Act. Observing, that involving identical facts the CIT(A) in the assessee's own case for A.Y. 2009-10 had directed the A.O to restrict the addition in respect of the bogus purchases at 3% of the value of the impugned purchases, the A.O, thus,

was of the view that as the said order of the first appellate authority had not been accepted by the revenue and had been assailed before the Tribunal, therefore, an addition qua the profit which the assessee would have made with respect to the impugned purchases which were claimed to have been made from the aforementioned non-existent parties could safely be taken at a higher figure. Accordingly, the A.O relying on the judgement of the Hon'ble High Court of Gujarat in the case of CIT vs. Simit P. Sheth (2013) 38 taxman.com 385 (Guj) made an addition of Rs.11,74,203/- i.e @12.5% of the impugned purchases of Rs.93,93,627/-. As such, the A.O vide his order passed u/s 143(3) r.w.s 147, dated 14.12.2017 assessed the income of the assessee under the normal provisions at Rs.29,69,580/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). It was observed by the CIT(A) that his predecessor in the assessee's own case for A.Y.2013-14 had directed the A.O to restrict the addition to 3% of the value of the bogus purchases. However, it was observed by the CIT(A) that on further appeal filed by the revenue the Tribunal had vide its order passed in ITA No. 47/Mum/2017 and ITA No. 167/Mum/2017, dated 13.12.2017 had enhanced the aforesaid addition to 6% of the value of the impugned purchases. Accordingly, the CIT(A) taking cognizance of the view taken by the Tribunal in the assessee's own case for A.Y. 2013-14 restricted the addition to 6% of the value of the impugned bogus/unverified purchases amounting to Rs.93,93,627/-.

5. As observed by us hereinabove, both the revenue and the assessee have assailed the order of the CIT(A) by filing their respective appeal and cross-objection before us. We have heard the Id. Authorized Representatives for both the parties and perused the orders of the lower authorities, as well as considered the material available on record. As is discernible from the orders of the lower authorities, we find that it is a matter of fact borne from the record that the assessee had failed to substantiate on the basis of clinching supporting evidence

the authenticity of the impugned purchases that were claimed to have been made from the aforementioned parties in question. At the same time, we concur with the view taken by the CIT(A) that as the assessee had purchased the goods in question i.e diamonds though not from the aforementioned hawala parties but from the open/grey market, therefore, the addition as regards such impugned purchases was liable to be restricted only to the extent of the profit which the assessee would had made by procuring the goods in question at a discounted value as against that booked in its books of accounts. As we have concurred with the view taken by the lower authorities that the assessee had not made any genuine purchases from the aforementioned tainted parties in question, therefore, our indulgence in the present appeal is confined to quantification of the profit element which the assessee would had made by procuring the goods at a discounted value from the open/grey market. In our considered view, as stated by the Id. A.R, and rightly so, the gross profit rate of the assessee company as regards its similarly placed genuine transactions for the year under consideration can safely be adopted as a yardstick for arriving at the profit which the assessee would have made as regards the impugned purchases under consideration. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Bombay in the case of Pr.CIT -17 Vs. M/s Mohammed Haji Adam & Smith Company Ltd. (ITA No.1004 of 2016, dated 11.02.2019). In its aforesaid order, the Hon'ble High Court 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 hereinabove had observed as under:

"8. In the present case, as noted above, the assessee was a trade 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 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 as that of the other genuine purchases.

6. Before us, the Id. A.R had submitted that the G.P rate of the assessee for the year under consideration was 9.19%. It was submitted by the Id. A.R that in case if the addition sustained by the CIT(A) @ 6% of the value of the purchases in question was sustained, then, the same would give unrealistic and unimaginable trading results in the case of the assessee for the year under consideration. Apart from that, the Id. A.R took us through the stock inventory of the assessee as on 31.03.2010, and submitted, that the entire purchases that were made from one of the party i.e M/s Mayur Exports had remained unsold and

formed part of its 'closing stock' for the year under consideration. Accordingly, the Id. A.R had tried to impress upon us that now when the purchases made by the assessee from the aforementioned party, viz. M/s Mayur Exports had not been sold, therefore, no addition qua the purchases made from the said party was called for in the hands of the assessee. Although, as observed by us hereinabove, we are of a strong conviction that the addition insofar the bogus/unproved purchases aggregating to Rs.93,93,627/- claimed by the assessee to have been made from the aforementioned parties is liable to be restricted only to the extent that the G.P rate of such purchases are brought in conformity with that of the other genuine purchases, however, we are not inclined to accept the claim of the Id. A.R that no addition as regards the impugned purchases claimed by the assessee to have been made from M/s Mayur Exports was called for in its hands. In our considered view, the addition in respect of the purchases made by the assessee from the open/grey market is backed by the reason that the goods in question would have been procured at a discounted value as against that accounted for on the basis of bogus purchase bills in the books of accounts. We, thus, in terms of our aforesaid deliberations herein direct the A.O to restrict the addition insofar the bogus/unproved purchases aggregating to Rs.93,93,627/- 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 the other similarly placed 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 addition in terms of our aforesaid observations. Accordingly, the order passed by the CIT(A) is set aside and the matter is restored to the file of the A.O for the limited purpose of giving effect to our aforesaid direction. The **Ground of appeal No. (i) and (ii)** filed by the revenue and the **cross-objection no. 2** are disposed off in terms of our aforesaid observations.

7. We shall now deal with the claim of the assessee that the CIT(A) had erred in upholding the validity of the reopening of the assessment u/s 147 of the Act by the A.O. Before us, it was submitted by the Id. A.R that a perusal of the 'reasons to believe' on the basis of which the case of the assessee was reopened u/s 147 of the Act revealed beyond doubt that the 'material' available with the A.O had no nexus with the formation of 'belief' on his part that the income of the assessee chargeable to tax had escaped assessment. In order to buttress his aforesaid claim the Id. A.R had drawn our attention to the copy of the 'reasons to believe'; Page 46 of the Assessee's Paper Book (APB). It was further submitted by the Id. A.R that the case of the assessee had been reopened merely on the basis of a borrowed satisfaction. Elaborating on his aforesaid contention, it was submitted by the Id. A.R that the A.O had merely acted upon the information that was received by him from the DGIT(Inv.), Mumbai, wherein the latter had intimated that the name of the assessee had figured as a beneficiary of the bogus purchases made from certain hawala dealers. It was submitted by the Id. A.R that neither any details as regards the nature of information nor that in respect of the alleged dealers from where the aforesaid information was gathered is discernible from the 'reasons to believe' recorded by the A.O. It was further submitted by the Id. A.R that original assessment in its case for the year under consideration was framed by the A.O u/s 143(3) r.w.s 153C, dated 27.03.2014, wherein notices u/s 133(6) were issued to majority of the supplier parties from whom purchases were made by the assessee. It was, thus, submitted by the Id. A.R that in the backdrop of the fact that the authenticity of the purchases made by the assessee had already subjected to a test check in the course of the aforesaid original assessment proceedings, therefore, merely on the basis of unsubstantiated material the concluded assessment of the assessee could not have been disturbed and therein reopened.

8. Per contra, the Id. D.R vehemently submitted that the A.O had validly recorded his satisfaction for reopening the assessment of the assessee. It was submitted by the Id. D.R that at the time of reopening of a case what is required is a bonafide belief on the part of the A.O that the income of the assessee chargeable to tax had escaped assessment. It was submitted by the Id. D.R that neither the A.O at the time of reopening of an assessment is required to conclusively establish that the income of the assessee chargeable to tax had escaped assessment, nor the sufficiency of the reasons recorded by the A.O can be allowed to form a basis for assailing the validity of the reopening of the case. In support of our aforesaid contention, the Id. A.R had relied on the judgment of the Hon'ble Supreme Court in the case of Raymond Woolen Mills Ltd. Vs. ITO & Ors. (1999) 236 ITR 34 (SC) and that of the Hon'ble High Court of Madras in the case of Sterlite Industries (India) Ltd. Vs. ACIT & Anr. (2008) 302 ITR 275 (Mad).

9. We have heard the Id. Authorized Representatives for both the parties in context of the aforesaid issue under consideration i.e validity of the reopening of the assessee's case u/s 147 of the Act. Before adverting any further, we think it fit to cull out the 'reasons to believe' on the basis of which the case of the assessee was reopened by the A.O u/s 147 of the Act, which reads as under:

ANNEXURE

Reasons for reopening: M/s. Fancy Diamond India Pvt. Ltd for, A.Y. 2010-

11

Name of the Assessee	:	M/s. Fancy Diamond India Pvt. Ltd
Assessment Year	:	2010-11
Financial Year	:	2009-10
PAN	:	AAACF3325J
Date	:	24.03.2017

The return of income for the A.Y. 2010-11 was filed on 24/09/2010 declaring total income at Rs. 17,95,380/-. Subsequently assessment u/s 143(3) of the Act has been completed on 27.03.2014.

2. Thereafter, information has been received from the Investigation Wing of the Income Tax Department, Mumbai, forwarding the details of hawala transactions routed through the hawala dealers and copy of statements recorded by Investigation wing. The information contains that the Investigation wing has examined the hawala dealers and recorded their statement wherein they have admitted that they had issued tax invoice only to the parties without delivery of actual material/goods.

3. From the list of such *hawala* dealers as provided by the Investigation Wing, Mumbai, it is noticed that the assessee company is one of the beneficiaries with regard to the purported transactions of purchases alleged to have been made from the following parties and these materials facts have not been disclosed by the assessee during the scrutiny proceedings for A.Y. 2010-11:

Sr.No.	Name of the concerns	A.Y.	Amount
1.	Daksh Diamonds	2010-11	Rs. 55,95,826/-
2.	Mayur Exports	2010-11	Rs. 37,97,801/-
		Total	Rs. 93,93,627/-

4. The above information has been examined and finds that the assessee has claimed excessive expenses on account of purchases from the above hawala dealers resulting into under-assessment and therefore, the income chargeable to tax has escaped assessment which amounts to more than 1 lakh for F.Y. 2009-10 by the reason of the failure on the part of the assessee to disclose



On a perusal of the aforesaid reasons, we find that the A.O after referring to the material i.e the information that was received by him from the Investigation wing, Mumbai, had therein clearly applied his mind and had observed that as per the information as the assessee company was one of the beneficiary qua the purchases made from the hawala parties, therefore, he had a 'reason to believe' that on account of claim of excessive expenses on account of purchases claimed by the assessee to have been made from the said hawala dealers, its income for the year under consideration had been under assessed. In the backdrop of the aforesaid facts, we are unable to comprehend as to on what basis it is claimed by the Id. A.R that the 'material' on the basis of which the case of the assessee had been reopened does not have any nexus with the formation of the 'belief' by the A.O that the income of the assessee chargeable to tax had escaped assessment. Also, we are unable to persuade ourselves to subscribe to the claim of the Id. A.R that the concluded assessment of the assessee had been reopened on the basis of a borrowed satisfaction. As observed by us hereinabove, the A.O in the backdrop of the information that was received by him from the Investigation wing, Mumbai had after due application of mind validly reopened the case of the assessee. Accordingly, finding no infirmity in the validity of the reopening of the assessee's case u/s 147 of the Act, we herein reject the claim of the assessee that the A.O had invalidly assumed jurisdiction u/s 147 of the Act. The **cross-objection no. 1** is dismissed.

10. The **cross objection no. 3** being general is dismissed as not pressed.

11. Resultantly, the appeal filed by the revenue is dismissed, while for the cross-objection filed by the assessee is partly allowed for statistical purposes in terms of our aforesaid observations.

Order pronounced in the open court on 26.08.2021

Sd/-
(S. Rifaur Rahman)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Mumbai;

Dated: 26.08.2021

PS: Rohit

Copy of the Order forwarded to :

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

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai