

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER
ITA Nos. 312-315/SRT/2017 (AYs 2009-10 to 2012-13)
(Hearing in Virtual Court)

Shri Hiteshbhai Popatbhai Sakariya, 17, Hetal Nagar Society, Nr. Navyug Collage, Rander Road, Surat-395005 PAN : AKVPS 5306 G	Vs	Income Tax Officer Ward-2(3)(7), Aaykar Bhavan, Majura Gate, Surat-395001
Assessee / appellant		Revenue / respondent

Assessee by	ShriHimanshu Gandhi, AR
Revenue by	Ms. Anupama Singla – Sr-DR
Date of hearing	27.08.2021
Date of pronouncement	09.11.2021

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This group of four appeals by assessee are directed against the separate orders of Id. Commissioner of Income tax (Appeals)-2, Suratall dated 17.09.2017for assessment years (AYs) 2009-10. In all appeals, the facts are almost similar, the assessee has raised certain common grounds of appeal, therefore, with the consent of the parties areclubbed together, heard and are decided by a consolidated order for appreciation of fact. The facts of appeal for A.Y 2009-10 in ITA No. 312/SRT/2017 was treated as lead case. The assessee has raised the following grounds of appeal:-

“1. On the facts and circumstances of the case and law, the Ld. CIT(A) erred in upholding the proceeding u/s 148 without appreciating the facts that proceeding was initiated without jurisdiction and on borrowed reasons.

2. On the facts and circumstances of the case and law, the Ld. CIT(A) erred in upholding the proceeding u/s 148 without appreciating the facts that sanction for reopening was not obtained from appropriate authority.

3. On the facts and circumstances of the case and law, the Ld. CIT(A) erred in confirming the action of Ld.AO of disallowing 25% purchases.

4. On the facts and circumstances of the case and law, the Ld. CIT(A) erred in confirming the addition of Rs.1,21,032/- made by Ld. AO on account of suspicious purchases.

5. On the facts and circumstances of the case and law, the Ld. CIT(A) erred in confirming the addition of Rs.1,21,032/- made by Ld. AO without providing information on he has relied, opportunity of cross examination. Thus action of AO is against the principal of natural justice and makes order invalid.”

2. Brief facts of the case are that assessee is engaged in the trading of diamond, filed its return of income for assessment year 2009-10 on 30.03.2010 declaring total income of Rs.2,29,216/-. The case was re-opened under section 147. Notice under section 148 of the Act was issued to the assessee on 30.03.2016 and was duly served upon assessee. In response to notice under section 148 of the Act, the assessee filed reply on 28.08.2016 and stated that the return of income filed on 30.03.2010 be treated as returned income in response to sec. 148 of the Act. The reasons of re-opening is provided to the assessee vide letter dated 22.08.2016. The case was re-

opened on the basis of information receipt for Investigation Wing (Mumbai) with Shri Rajendra Jain and Shri Sanjaya Choudhary Dharmichand Jain Group were involved and providing accommodation entries a bogus purchased. The said group was running several benami concerned. The assessee is one of the beneficiary of purchases from M/s Karnavat Impex Pvt. Ltd. of Rs.4,84,128/-. It was further informed that a search action u/s 132 was carried out by Investigation Wing (Mumbai) on Shri Rajendra Jain Group on 30.10.2013. During the search statement of hawala operation was recorded wherein they admit about providing bogus unsecured loan, bogus purchases and sale of accommodation entry. The Assessing Officer after serving the reasons recorded and statutory notice u/s 143(2) r.w.s. 142(1) of the Act provided for assessment. The assessee was confronted with the report of investigation wing of Mumbai. The assessee was asked to as to why the purchases shown from M/s Karnavat Impex Pvt. Be not treated as undisclosed income. The assessee filed its reply dated 05.12.2016. In reply, the assessee contended that show cause notice appears to have issued on the basis of internal report of higher officers. The entire contents of notice is based on hearsay only which is patently bad in law and illegal. The notice is silent about the evidence gathered. There is no evidence against the assessee. The assessee submits that they are unable to offer any comment in absence

of evidence. On merit, to substantiate the purchases the assessee stated that purchases are fully supported by invoice, a xerox copy of invoices were furnished. The payments were made through cheque and the diamond purchases have been shown and income earned thereon has been shown. The assessee in the reply also requested to provide the statement recorded u/s 132(4) of all the persons and their cross-examination and to issue notice u/s 133(6) was summoned sec. 131 were supplied to verify the genuineness of purchase. The assessee finally stated that they have made purchase from M/s Karnavat Impex Ltd. of Rs.4,84,128/- on 10.06.2008 and have been sold on 16.06.2008 to M/s Laxmi Jewels for Rs.5,09,343/-. In the same lot and with the same quality and quantity and earned profit of Rs.25,215/-, which proves that impugned purchase was not bogus. The sale invoice was also furnished. The reply furnished by assessee was not accepted by the Assessing Officer. The Assessing Officer held that investigation authorities carried out investigation wherein it is confirmed that assessee receipt bogus accommodation bills. The bills were issued on commission to various parties. The burden of proof that purchasing made by assessee from those parties are genuine is on the assessee. The hawala operator explained their *modus operandi* used in the business in giving bogus bills. The Assessing Officer discussed the *modus operandi* of entry provided and disallowed 25%

of purchases by following decision of Hon'ble jurisdictional High Court in the case of Vijay Proteins Ltd. vs. CIT (996 55 TTJ76 (Ahd) in assessment order passed u/s 143(1) r.w.s 147 of the Act on 15.08.2016. Aggrieved by the addition in the assessment order and against the re-opening the assessee filed appeal before the Ld. Commissioner of (Appeals) [CIT(A)]. Before Ld. CIT(A) the assessee filed detailed written statement on the validity of re-opening as well as on merit of the addition. The submission of assessee against the validity of re-opening is recorded in para-5 in the impugned order. The Ld. CIT(A) confirmed the action of the A.O. in reopening. However on merit the Ld. CIT(A) sustained the additions on account of bogus purchases to the extent of 25% of the purchases shown from Karnavat Impex Ltd. Further aggrieved, the assessee has filed present appeal before this Tribunal.

3. We have heard the submission of the ld. Authorised representative (ld.AR) of the assessee and the ld. Senior Departmental representative (ld. Sr-DR) for Revenue. Ground No. 1& 2 relates to validity of reopening. During the hearing no specific submissions were made by the ld. AR for assessee. Therefore, these grounds of appeal are treated as not pressed. Ground No. 3 to 5 relates to restricting the disallowance of alleged bogus purchase to the extent of 25%. The ld AR for the assessee submits that in assessee's own case for AY 2008-09, the AO made similar addition @ 25%of purchases. On

appeal before Id CIT(A), the matter was decided ex-parte. On further appeal before Tribunal the matter was restore to the file of CIT(A) for adjudication on merit. The Id CIT(A) in order giving effect to the order of l Tribunal restricted the addition to the extent of 5% of similar addition vide his order dated 19.01.2019 and no further appeal is filed by the revenue against that order. The Id AR for the assessee submits that the assessee filed sufficient evidence to prove the purchases. The AO has not made any comment on the documentary evidence furnished by assessee. The AO solely relied upon the statement of third party and the report of Investigation Wing. The report of wing and the statement of alleged entry providers were not provided to the assessee. The AO has not disputed the sales of assessee. No sale is possible in absence of purchase. The books of accounts were not rejected. The AO made the disallowance of entire purchases. The assessing officer not provided cross examination of the alleged hawala dealers. The disallowances upheld by the Ld. CIT(A) @ 25% of the impugned purchases, is on higher side and deserve to be deleted in total. The Id AR for the assessee submits that the assessee has shown very good gross profit (GP) in all years. In AY 2009-10 the assessee has declared GP at 4.95 %, in AY 2010-11 at 17.55% and in AY 2011-12 at 5.38%. The Id.AR of the assessee submits that entire purchases shown by assessee are genuine. In without prejudice and alternative submissions, the Ld. AR for the assessee submits that in alternative submission, the disallowance may be sustained on

reasonable basis. To support his various submission, the ld.AR for the assessee is relied upon case laws;

- PCIT Vs Tejua Rohit Kuma Kapadia (2018) 94 taxmann.com 325(SC),
- Earthmoving Equipment's Services Corporation Vs DCIT (ITA 6617/Mum/2014,
- Sajani Jewels Vs DCIT (SLP No. 17935 of 2015 (Guj HC)

4. On the other hand ld. DR for the Revenue supported the order of the Assessing Officer/CIT(A) . The ld. CIT-DR submits that Investigation Wing of Revenue made full fledged inquiry in case of Rajendra Jain and Sanjay Chaudhary group. The Rajendra Jain and Sanjay Chaudhary during the search operation as well as in post-search operation admitted that they were engaged in providing accommodation entries that actual book of accounts. No stock diamonds were found during the search on Rajendra Jain and Sanjay Chaudhary. The ld. DR for the revenue further submits that Rajendra Jain and Sanjay Chaudhary while filing return of income has offered that their income as commission agent (entry provider). Further, the appeal of those entries provider Rajendra Jain and Sanjay Chaudhary are pending before the Tribunal and the Hon'ble Bench may take judicial notice of all those facts while deciding the present appeal. The prayer of the ld AR that the disallowances may be restricted to 5%, is on a very lower side, the ld CIT(A) has taken a very reasonable view while restricting the disallowance to 25% of the disputed purchases.

5. We have considered the rival submissions of both the parties and have gone through the order of authorities below. We have also deliberated on all the case laws relied by the ld AR for the assessee. We find that Assessing Officer while making addition on account of disallowance of 25% of purchases shown from Karnavat Impex Ltd.; solely relied upon the report of Investigation Wing without giving any finding on the documentary evidence furnished by assessee or making any independent investigation. The assessing officer has not disputed the sales of the assessee. No sale is possible without purchases. The statement of accounts of the assessee was not rejected by the assessing officer. The ld. CIT(A) confirmed the addition made by AO. We are of the considered view, even if the parties are failed to prove the genuineness of entire transaction of such tainted purchases, the revenue authorities are not entitled to bring the substantial or entire transaction to tax, rather to tax the income component in such tainted transactions to avoid the possibility of revenue leakage.
6. After considering the decision of Tribunal in assessee's own case for earlier year and the GP and NP ratio declared by assessee for the year under consideration. We find that assessee has declared in AY 2009-10 the assessee has declared GP at 4.95 %, in AY 2010-11 at 17.55% and in AY 2011-12 at 5.38%. It is a settled law that principles of *res judicata* is not applicable in the income tax proceeding, similarly it is also settled legal view that consistency must be followed if there is no variation in the facts qua

earlier or subsequent years. Therefore, in order to avoid the possibility of revenue leakage 6%, would meet the end of justice. Similar view was adopted by this combination, wherein the beneficiary of such purchases has shown very meagre GP. Therefore, we modify the order of ld. CIT(A) and restrict the addition of impugned/bogus purchases to the extent of 6%. The assessing officer is directed accordingly. In the result, the ground No. 3 to 5 of appeal raised by the assessee are partly allowed. In the result, appeal of assessee for AY 2009-10 is partly allowed.

7. Considering the facts that the facts in all remaining appeal for AY 2010 to 2012-13 in ITA No. 313 to 315/SRT/2017 are partly allowed with similar direction.

Order announced in Court on 09/11/2021 as per Rule 34(5) of Income tax (Appellate Tribunal) Rules -1963 by placing result on the notice board.

Sd/-

(Dr ARJUN LAL SAINI)
ACCOUNTANT MEMBER

Surat, Dated: 09/11/2021

Dkp. Sr.P.S. O.S

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-2, Surat
4. CIT
5. DR
6. Guard File

Sd/-

(PAWAN SINGH)
JUDICIAL MEMBER

By order

Assistant Registrar, ITAT, Surat