

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA Nos.774&765/SRT/2018

(निर्धारणवर्ष / Assessment Year: (2008-09)

(Virtual Court Hearing)

M/s Borda Brothers 8/9 Saurashtra Diamond B/h Geetanjali Cinema, Varachha Road,Surat-395006	Vs.	Dy. Commissioner of Income Tax, Circle-3(3), Aayakar Bhawan, Majura Gate, Surat- 396009
Income Tax Officer, Ward- 3(3)(1), Room No. 418, Aayakar Bhavan, Marjura Gate, Surat- 395001		M/s Borda Brothers b/8, Panchdev Society, B/h Laxmi Hotel, Varachha Road,Surat-395006
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAEFB 0796 Q		
(Appellant)		(Respondent)

Assessee by : Shri Sapnesh R Sheth, C.A

Revenue by : Shri H.P.Meena, CIT-DR

सुनवाई की तारीख/ **Date of Hearing** : **29/03/2022**

घोषणा की तारीख/**Date of Pronouncement** :**29/03/2022**

आदेश / ORDER

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

Captioned cross-appeals filed by the assessee and Revenue pertaining to assessment year (AY) i.e. 2008-09, are directed against the common order passed by the Learned Commissioner of Income Tax(Appeals)-3, Surat,['CIT(A)' for short] dated 28.09.2018, which in turn arise out of an order passed by the Assessing Officer under section 144 r.w.s 147of the Income Tax Act, 1961 (in short 'the Act'), dated 04.03.2016.

2. Grounds of appeal raised by the assessee in ITA No.774/SRT/2018, for A.Y 2008-09, are as follows:

(1) *On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income-tax (Appeals) has erred in confirming the action of assessing office in reopening assessment by issuing notice u/s 148 of the I.T. Act, 1961.*

(2) *On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income-tax (Appeals) has erred in partly confirming the action of assessing office in making addition as unverifiable purchase by sustaining addition to the extent of Rs.16,67,393/- as against addition of Rs.3,33,47,863/- made by ld. Assessing officer.*

(3) *It is therefore prayed that above addition made by assessing officer and confirmed by Commissioner of Income-tax (Appeals) may please be deleted.*

(4) *Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.*

3. At the outset, Ld. Authorized Representative (AR) for the assessee, informs the Bench that assessee does not wish to press ground No.1, therefore, we dismiss ground no.1, as not pressed.

4. At the outset, we note that these cross-appeals of Assessee and Revenue, relate to bogus purchases from Shri Rajendra Jain Group, Sanjauy Chaudhary Group and Dharmichand Jain Groups. The Assessing Officer disallowed 100% of bogus purchases to the tune of Rs.3,33,47,863/-.

5. On appeal, the Ld. CIT(A) restricted the disallowance of bogus purchases @ 5% of total purchases at Rs.16,67,393/- (5% of Rs.3,33,47,863/-). Before us, Ld. AR for the assessee, submits, vide paper book page 29, that gross profit rate and the net profit rate of the assessee are higher as compared to the previous year, therefore, more relief may be granted to assessee. Learned DR for the Revenue submitted before the Bench that assessee did not appear during the assessment stage and did not argue to the effect that its gross profit and net profit rate is higher side. Therefore, it is an additional argument based on gross profit and net profit ratio and working of GP and NP is an additional evidence and thus case may be remitted back to the file of AO for his examination. The assessing officer passed *ex-parte* order under section 144 of the Act. The veracity of gross

profit and net profit ratio has not been examined by assessing officer, therefore, at this stage, Id Counsel did not take this plea. The Id DR further contended that in case of such type of assessee, who did not respect the law, the disallowance should be confirmed at the rate of 100% of bogus purchases.

6. We note that in case of Rajendra Jain Group, Sanjay Chaudhary Group and Dharmichand Jain Group, this Tribunal has taken a constant view and made disallowance @ 6% of bogus purchases, therefore, grounds of appeal raised by assessee are covered by the Decision of the Co-ordinate Bench of this Tribunal vide order dated 27.09.2021 in the case of Pankaj K. Choudhary & others, wherein the Co-ordinate Bench has held as under:

“9. On merit, the ld.CIT(A) after discussing the submission of assessee held that AO has not discussed about any details of books of accounts, documents, stock register produced by assessee during the assessment. The AO neither examined nor found any defect in the document to discredit the same. The assessee has produced day to day stock register, details of purchase and sale. The purchases made during the year are sold during the year as seen from the trading account. If the impugned purchases are treated as bogus, then the stock in hand will become negative from 26.06.2006 onwards and no sale is possible in absence of purchases. The AO relied on the statement of Bhanwarlal Jain recorded by Investigation Wing against, copy of purchase bill, copy of bank statement, showing payment, day to day stock register, incoming and outgoing diamonds and daily stock tally, confirmation of the impugned parties from whom the said purchases has been made, thus, the assessee practically furnished all possible evidences in support of his claim for purchases. Moreover all the payment are made by bank account. The AO has made no comments about these documentary evidences. On the aforesaid observation, the ld.CIT(A) concluded that assessment order suffer from incomplete investigation, lack of marshalling of all relevant facts and procedural loop holes. Similarly, the ld. CIT(A) also observed that there is no denying circumstances under which statement were made by Bhanwarlal Jain and the elaborate modus-operandi unearthed by Investigation Wing, Mumbai, which has created sufficient suspicion regarding the purchase made by the assessee. The said parties are assessed with Central Circle, Mumbai where they are treated as “entry provider” and assessed accordingly.

10. The ld.CIT(A) after referring the decision of Tribunal in Bholanath Poly Fab Private Limited in ITA No.137/AHD/2009 dated 26.07.2011 wherein the addition was sustained to the extent of 12%. The ld CIT(A) by following the observation of order of Tribunal in Bholanath Poly fab Pvt. Ltd.(supra), the ld.CIT(A) held that the assessee may have made purchases from elsewhere and obtained the bills from impugned supplier to inflate Gross Profit Rate. The ld CIT(A) after considering the overall facts, submissions of the assessee and evidences produced by assessee, concluded that the 100% disallowance of purchase is not justified. The ld.CIT(A) also considered the decision of jurisdictional High Court in Mayank Diamonds Pvt. Ltd. reported in [2014] 11 TMI 812 (Guj) (Tax Appeal No.200 of 2003 dated 07.11.2014). The ld.CIT(A) compared the fact of the present case, with the facts in case of Mayank Diamonds (supra) and noted that assessee in that case was also engaged in the trading of polished diamonds. The AO in said case made disallowance of entire bogus purchase. The ld.CIT(A) dismissed the

appeal, however, the Tribunal gave partial relief to the assessee directing and sustained the addition @12%. And on further appeal before Hon'ble High Court, the disallowance was sustained at Gross Profit Rate of 5%, which is average rate of profit in industry. The ld. CIT(A) further held that in some other similar cases though he has sustain 5% of Gross Profit Rate considering the fact that where Gross Profit shown by assessee is more than 5%. However, in the present case, the assessee has merely shown Gross Profit Rate only at 0.78% of turnover, accordingly, the ld.CIT(A) was of the view that disallowance of 12.5% of impugned purchases/bogus purchases would be reasonable to meet the end of justice, hence the disallowance was restricted to 12.5% of the impugned purchase.

11. Aggrieved by the order of ld. CIT(A), both the parties have filed cross appeals. The assessee has challenged the validity of reopening as well as sustaining the addition to the extent of 12.5% only. Likewise, the Revenue has assailed the order for sustaining addition to the extent of 12.5% only. We have noticed that there is typing mistake in the ground no. 2 of revenue's appeal wherein the assessing officer has mentioned the additions of '5%' instead of '12.5%'.

12. We have heard the submission of ld.CIT-DR for the Revenue and the ld. Authorised Representative (AR) of the assessee. We have also gone through the various documentary evidences furnished by assessee. The ld. CIT-DR for the Revenue supported the order of AO. The ld. CIT-DR submits that Investigation Wing, Mumbai made a search on Bhanwarlal Jain Group. During the search and after search, the Investigation Wing made a thorough investigation and concluded that Bhanwarlal Jain Group and his associates including his sons were indulging in managing about 70 benami concerns. The benami concerns were engaged in providing accommodation entries. The assessee is one of the beneficiaries of such accommodation entries. In the transaction of accommodation entries, the documentary evidences are created in such a way, so that the bogus transaction is looks like genuine transaction. In bogus transaction, the fabricated evidences are always maintained perfectly. The assessee has obtained accommodation entry only to inflate the expenses and to reduce the ultimate profit. No stocks of diamonds were found at the time of search on Bhanwarlal Jain Group. The assessee has shown a very meagre gross profit (GP) @ 0.78% and not net profit (NP) at 0.02%. The ld. CIT(A) restricted the addition to the extent of 12.5% which is on the lower side. The ld. CIT-DR for the revenue prayed that disallowance made by the AO may be upheld or in alternative submitted that it may restricted at least @ 25%, keeping in view that the NP declared by the assessee is extremely on lower side.

13. On the validity of reopening, the ld.CIT-DR for the revenue submits that the AO received credible information about the accommodation entry provided by Bhanwarlal Jain Group. The assessee is one of the beneficiaries, who had availed accommodation entries from such hawala trader. At the time of recording reasons, the mere suspicious about the accommodation entry is sufficient as held by Hon'ble jurisdictional High Court in various cases. To support his submissions, the ld.CIT-DR relied upon the decision;

- *Pushpak Bullion (P) Ltd Vs DCIT [2017] 85 taxmann.com 84 (Gujarat High Court),*
- *Peass Industrial Engineers (P) Ltd Vs DCIT [2016] 73 taxmann.com 185 (Gujarat High Court),*
- *ITO Vs PurushttomDassBangur [1997] 90 Taxman 541 (SC) and*
- *Mayank Diamond Private Limited (2014) (11) TMI 812 (Gujarat High Court).*
- *AGR Investment Vs Additional Commissioner 197 Taxman 177 (Delhi) and*
- *Chuharmal Vs CIT [1998] 38 Taxman 190 (SC).*

14. On the other hand, the ld.AR of the assessee submits that he has challenged the validity of reopening as well as restricting the addition to the extent of 12.50% of the alleged bogus purchases. The ld.AR of the assessee submits during the assessment, the AO has not made any independent investigation. The AO reopened the case of the assessee on the basis of third party information without making any preliminary investigation. The AO received vague information about providing accommodation entry by Bhanwarlal Jain Group. No specific information about the accommodation entry obtained by assessee was received by AO. There is no live link between the reasons recorded qua the assessee. Therefore, the re-opening is invalid and all subsequent action is liable to be set aside.

1	<i>M/s Andaman Timber industries Vs Commissioner of Central Excise, CIVIL APPEAL NO. 4228 OF 2006 (Supreme Court)</i>
2	CIT vs. Indrajit Singh Suri [2013] 33 taxmann.com 281 (Gujarat)
3	<i>Albers Diamonds Pvt. Ltd. Vs ITO 1(1)(1), Surat I.T.A. No.776 &1180/AHD/2017</i>
4	<i>The PCIT-5 vs. M/s. Shodiman Investments Pvt. Ltd. TTANO. 1297 OF 2015 (Bombay High Court)</i>
5	<i>Shilpi Jewellers Pvt. Ltd. vs. Union of India &Ors. WRIT PETITION NO. 3540 OF 2018 (Bombay High Court)</i>
6	<i>CIT in Vs. Mohmed Juned Dadani 355 ITR 172 (Gujarat)</i>
7	<i>Micro Inks Pvt. Ltd. Vs. ACIT [2017] 79 taxmann.com 153 (Gujarat)</i>
8	Shakti Karnawat Vs. ITO - 2(3)(8), Surat ITA 1504/Ahd/2017 and 1381 /Ahd/2017
9	<i>Asian Paints Ltd. Vs. DCIT, [2008] 296 ITR 90 (Bombay)</i>
10	<i>PCIT, Surat I Vs. TejuRohitkumar Kapadia [2018] 94 taxmann.com 325 (SC)</i>
11	<i>The PCIT-17 vs. M/s Mohommad Haji Adam & Co. ITA NO. 1004 OF 2016(Bombay High Court)</i>
12	<i>Pankaj Kanwarlal Jain HUF Vs. ITO 2(3)(8) Surat ITA.No.269/SRT/2017</i>

15.

An account of additions of bogus purchases, the ld.AR submits that in the original assessment, the assessee filed its complete details of purchases to prove the genuineness of expenses. The AO accepted the same in the assessment order passed under section 143(3) on 10.03.2009. During re-assessment, the assessee again furnished complete details about the genuineness of purchases. The assessee filed confirmation purchases invoices, accounts of the parties, bank statement of assessee showing transaction to the banking channel. 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 Bhanwarlal Jain 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 sustained by the Ld. CIT(A) @ 12.5% of the impugned purchases, is on higher side and deserve to be deleted in total. The ld.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:

16. In the rejoinder submissions the ld. CIT-DR for the revenue submits that that rigour of the rules of evidence contained in the Evidence Act is not applicable before the tax authorities. It was submitted that the ratio of various case laws relied by the ld. AR for the assessee is not applicable on the facts of the present cases. The ratio of decision of Hon'ble Gujarat High Court in *Mayank Diamond Private Limited (supra)* is directly applicable on the facts of the present case.

17. We have considered the submissions of the parties and have gone through the order of the lower authorities. We have also deliberated on each and every case laws relied by both the parties. We have also examined the financial statement of all the assessee(s) consisting of computation of income and audit report. We have also gone through the documentary evidences furnished in all cases. Ground No.1 in assessee's appeal relates to the validity of reopening. The ld AR for the assessee vehemently argued that the AO reopened the case of the assessee on the basis of third party information, and without making any preliminary investigation, which was vague about the alleged accommodation entry by Bhanwarlal Jain Group. And that there was no specific information about the accommodation entry availed by the assessee. There is no live link between the reasons recorded qua the assessee. We find that the assessee has raised objection against the validity of the reopening before the AO. The objections of the assessee was duly disposed by AO in his order dated 09.02.2015. The assessee raised ground of appeal before ld CIT(A) while assailing the order of AO on reopening. The ld CIT(A) while considering the ground of appeal against the reopening held that the AO has received report from investigation wing Mumbai, which indicate that the assessee is beneficiary of the accommodation entry operators. The accommodation entry provider admitted before investigation wing that he has given such entry to various persons; based on such report the AO has reason to believe that the income of the assessee has escaped assessment and thus the action of AO in reopening is justified.

18. We find that the Hon'ble Jurisdictional High Court in *Peass Industrial Engineers (P) Ltd Vs DCIT (supra)* while considering the validity of similar notice of reopening, which was also issued on the basis of information of investigation wing that they have searched a person who is engaged in providing accommodation entries, held that where after scrutiny assessment the assessing officer received information from the investigation wing that well known entry operators of the country provided bogus entries to various beneficiaries, and assessee was one of such beneficiary, assessing officer was justified in re-opening assessment. Further similar view was taken by Hon'ble Jurisdictional High Court in *Pushpak Bullion (P) Ltd Vs DCIT (supra)*. Therefore, respectfully following the order of Hon'ble High Court, we find that the assessing officer validly assumed the jurisdiction for making re-opening under section 147 on the basis of information of investigation wing Mumbai. So far as other submissions of the ld AR for the assessee that there is no live link of the reasons recorded, we find that the Hon'ble Jurisdictional High Court in *Peass Industrial Engineers (P) Ltd* clearly held that when assessing officer received information from the investigation wing that two well known entry operators of the country provided bogus entries to various beneficiaries, and assessee was one of such beneficiary, assessing officer was justified. Hence, the ground No. 1 in assessee's appeal is dismissed.

19. Ground No. 2 in assessee's appeal and the grounds of appeal raised by the revenue are interconnected, which relates to restricting the disallowance of bogus purchases to the extent of 12.5%. The AO made of 100% of purchases shown from the hawala dealers/ entry provider namely Bhanwarlal Jain. We find that the AO while making additions of 100%, of disputed purchases solely relied on the report of the

investigation wing Mumbai. No independent investigation was carried by the AO. The AO has not disputed the sale of the assessee. The AO made no comment on the evidences furnished by the assessee. We further find that Id CIT(A), while considering the submissions of the assessee accepted the lapses on the part of the AO and noted that no sale is possible in absence of purchases. The Books of the assessee was not rejected by the AO. The Id CIT(A) on further examination of the facts and various legal submissions find that Ahmedabad Tribunal in Bholanath Poly Fab Private Limited (supra) held that in the such cases the addition of bogus purchases was sustained to the extent of 12%, on the observation that the assessee may have made purchases from elsewhere and obtained the bills from impugned supplier to inflate Gross Profit Rate. The Id CIT(A) by considering the overall facts, concluded that the 100% disallowance of purchase is not justified. We also find that the Id.CIT(A) also considered the decision of jurisdictional High Court in Mayank Diamonds Pvt. Ltd. (supra) and compared the fact of the present case with the facts in Mayank Diamonds Pvt Ltd (supra) and noted that assessee in that case was also engaged in the trading of polished diamonds. The Id CIT(A) noted that in that case the AO made disallowance of entire bogus purchase and on first appeal before CIT(A) the disallowances were maintained. However, the Tribunal gave partial relief to the assessee directing to sustain the addition @12% of such bogus purchases. And on further appeal, the Hon'ble High Court sustained Gross Profit Rate @ 5% being average rate of profit in industry.

20. Now advertent to the facts of the present case, the Id.CIT(A) held that in some other similar cases; though he had sustain 5% of Gross Profit Rate, considering the fact that where Gross Profit shown by those assessee's are more than 5%. However, in the present case, the assessee has merely shown Gross Profit Rate only at 0.78% of turnover, accordingly, the Id. CIT(A) was of the view that disallowance of 12.5% of impugned purchases/bogus purchases would be reasonable to meet the end of justice.

21. We have seen that during the financial year under consideration the assessee has shown total turnover of Rs. 66,09,62,458/-. The assessee has shown Gross Profit @ .78% and net Profit @ .02% (page 11 of paper Book). The assessee while filing the return of income has declared taxable income of Rs. 1,81,840/- only. We are conscious of the facts that dispute before us is only with regard of the disputed purchases of Rs, 4.34 Crore, which was shown to have purchased from the entity managed by Bhanwarlal Jain Group. During the search action on Bhanwarlal Jain no stock of goods/ material was found to the investigation party. Bhanwarlal Jain while filing return of income has offered commission income (entry provider). Before us, the Id CIT-DR for the revenue vehemently submitted that the ratio of decision of Hon'ble Gujarat High Court in Mayank Diamond Private Limited (supra) is directly applicable on the facts of the present case. We find that in Mayank Diamonds the Hon'ble High Court restricted the additions to 5% of GP. We have seen that in Mayank Diamonds P Ltd (supra), the assessee had declared GP @ 1.03% on turnover of Rs. 1.86 Crore. The disputed transaction in the said case was Rs. 1.68 Crore. However, in the present case the assessee has declared the GP @ 0.78%. It is settled law that under Income-tax, the tax authorities are not entitled to tax the entire transaction, but only the income component of the disputed transaction, to prevent the possibility of revenue leakage. Therefore, considering overall facts and circumstances of the present case, we are of the view that disallowances @ 6% of impugned purchases / disputed purchases would be sufficient to meet the possibility of revenue leakage. In the result the ground No. 2 of appeal raised by the assessee is partly allowed and the grounds of appeal raised by revenue are dismissed."

7.As, the issue is squarely covered by the decision of the Coordinate Bench, in the case of Pankaj Choudhary(supra), and there is no change in facts and law and the ld Counsel is unable to produce any material to controvert the aforesaid findings of the Coordinate Bench(supra), hence respectfully following the binding precedent, we dismiss assessee`s appeal and allow Revenue`s appeal partly.

8. In the result, appeal of the Assessee is dismissed whereas appeal of the Revenue is partly allowed in above terms.

A copy of the instant common order be placed in the respective case file(s)

Order pronounced in the open court on 29/03/2022 by placing the result on the Notice Board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat/दिनांक/ Date:29/03/2022

Dkp Outsourcing Sr.P.S.

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

// True Copy //

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Surat