

IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH, MUMBAI  
BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &  
SHRI S RIFAUR RAHAMAN, ACCOUNTAT MEMBER

ITA No. 5632 & 5633/Mum/2019  
(A.Y: 2009-10 & 2010-11)

ACIT, CC- 1(3) 905, 9 <sup>th</sup> Floor, Pratistha Bhavan, Old CGO Bldg, (Annexe), M.K .Road, Mumbai- 400020.	Vs.	M/s Peninsula Land Ltd., No. 2, Peninsula Spenta, Mathuradas Mill Compound, Senapati Bapat Marg, Parel, Mumbai- 400013.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AA ACT5173A		
Appellant	..	Respondent

Appellant by :	Shri. Aditya Rai. DR
Respondent by :	Shri. Vijay Mehta.AR

Date of Hearing	24.06.2022
Date of Pronouncement	28.07.2022

आदेश / O R D E R

**PER PAVAN KUMAR GADALE, JM:**

These are the two appeals filed the by the revenue against the common order of the Commissioner of Income Tax (Appeals)-47, Mumbai passed u/s 153A r.w.s 143(3) and 250 of the Act.

Since the issues in these two appeals are common and identical, hence are clubbed, heard and consolidated

order is passed. For the sake of convenience, we shall take up the ITA No.5632/Mum/2018 for the A.Y2009-10 as a lead case and the facts narrated. The revenue has raised the following grounds of appeal:

1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in overlooking the fact that during the search proceeding of u/s 132 of the Act, the assessee had admitted additional income on account of bogus purchase and thereafter the assessee had retracted the admission made without supporting evidence, whereas, such retraction is not admissible as per the decision of the Hon'ble Supreme Court in the case of Bannalal Jat Construction (P) Ltd. Vs. ACIT 106 Taxman 128 DD. 08.04.2019.*

2. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the amount of Rs. 54,80,606/- without considering and appreciating the fact that the assessee had failed to justify its claim alongwith documentary evidences.*

3 *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in confirming the addition only to the extent of 12.5%/ - (Rs. 37,72,568/-) & accordingly relief of Rs. 2,64,07,979/-given to assessee without considering and appreciating the facts that the assessee had failed to justify its claim alongwith documentary evidences.*

2. The brief facts of the case are that the assessee company is engaged in the business of real estate development works. The assessee has filed the return of

income for the A.Y 2009-10 on 29.010.2009 disclosing a total income of Rs.1,18,55,09,815/- and Book profit of Rs.1,77,23,33,136/- u/s 115JB of the Act. Subsequently, the assessee has filed the revised return of income on 01.03.2011 disclosing a total income of Rs.1,49,77,61,310/- under the normal provisions of the Act and Book profits of Rs. 1,80,62,25,822/- u/s 115JB of the Act. Subsequently the case was selected for scrutiny and the assessment was completed u/s 143(3) of the Act determining the total income of Rs.2,01,36,88,490/- under normal provisions of the Act. There was a search and survey operations u/s 132/133A of the Act was carried out on 29-04-2014 in the case of M/s Peninsula land Ltd and its associate concerns including the assessee and the notice u/s 153A of the Act was issued. In compliance to the notice, the assessee has filed the return of income on 09.05.2015 with the total income of Rs. 1,42,55,28,377/- and the A.O. has issued the notice u/s 143(2) and 142(1) of the Act. In compliance to the notice, the Ld.AR of the assessee appeared from time to time and furnished the details and explained that the assessee company is engaged in the business of real

estate development and develop both residential and commercial projects. The income from business operations includes realty sales, lease rentals and services.

3. The A.O has received the information that the assessee company has made bogus purchases amounting to Rs.10,36,19,844/- and a show cause notice was issued referred at Para 3 of the AO order. Whereas the assessee company has filed the reply /written submissions vide letter 07.12.2016 explaining the details of purchases made in F.Y.2008-09 from 10 parties referred at Para 4 of the assessment order. The A.O has considered the elaborate submissions and various information and issued notice U/sec133(6) of the Act on the parties and worked out the statistics and relied on the judicial decisions. The A.O has observed at Para 5 of the order on the explanations and various projects details incorporated in the transactions and treated as bogus transactions. Finally the A.O has assessed the total income by considering the business income, bogus purchases and disallowance @10% of bogus purchases towards expenses and order giving effect of earlier CIT(A) orders

and assessed the total income of Rs. 1,52,01,02,615/- and passed the order u/s 153A r.w.s 143(3) of the Act dated 30.12.2016.

4. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). The assessee has raised the grounds of appeal challenging the disallowance of bogus purchases of Rs.3,56,61,153/- and disallowance @10% of bogus purchases towards expenses incurred. Further the assessee has raised the additional ground of appeal as under and was admitted:

*8.0 The additional ground of appeal raised by the Appellant, during the course of the appellate proceedings is reproduced as under:-*

*"On the facts and in the circumstances of the case, the Ld. AO, while computing total income under normal provisions, erred by making disallowance u/s 14A at Rs. 4,67,40,503/- by ignoring suo-moto disallowance of Rs. 1,28,47,817/- made by the appellant at the time of filing return of income u/s 153A. The said action of the AO is erroneous and needs to be modified accordingly.*

5. Whereas the CIT(A) considered the submissions, the findings of the A.O. and the grounds of appeal. In the appellate proceedings, and called for the remand report. Finally the CIT(A) has granted the relief in respect of bogus purchases taxing the profit element

embedded in the purchases and deleted the disallowance @10% towards expenses and partly allowed the appeal. Aggrieved by the CIT(A) order, the revenue has filed an appeal before the Honble Tribunal.

6. At the time of hearing, the Ld. DR submitted that the CIT(A) has erred in overlooking the facts that in the search proceedings u/s 132 of the Act, the assessee has admitted additional income on account of bogus purchases and the assessee has retracted the admission statement after wards. Further, the CIT(A) has erred in deleting the amount of Rs. 54,80,606/- towards the expenses without justifying the proper reasons. Whereas in respect of the bogus purchases, the CIT(A) has erred in sustaining the addition to the extent @ 12.5% as against @ 100% made by the A.O. The Ld.DR relied on the Assessing officer order and prayed for allowing the revenue appeal. Contra, the Ld.AR supported the order of the CIT(A).

7. We heard the rival submissions and perused the material on record. The Ld.DR submitted that the CIT(A) has erred in granting relief to the assessee

irrespective of facts that the Assessee has not provided complete details in the Assessement proceedings. On the first disputed issue, the Ld.DR submitted that the Ld.CIT(A) has erred in deleting the disallowance @10% of the purchases set apart by the A.O. towards the expenses. In the Assessement proceedings, the A.O. has observed that the assessee has taken the purchase entries which are not genuine and also the fact that the assessee must have incurred certain direct and indirect expenses related to such transactions and which cannot be quantified and the made adhoc disallowance @10% of the purchases to cover up all the discrepancies and expenses related to such bogus purchases. We Find that the CIT(A) has considered the facts, that the A.O. has issued notice u/sec133(6) of the Act on such parties and they had responded to the notices and details were filed and were examined by the assessing officer.

8. We find that the CIT(A) has considered the factual aspects and transactions of alleged bogus purchases and the response of the Parties to the A.O. or not, but considering the profit element in the transactions to be taxable and directed the deletion of disallowance @10%

by the Assessing officer. On the last issue, with respect to directions of the CIT(A) to make @12.5 %disallowance of total bogus purchases. We find that the CIT(A) has restricted the addition to the extent of 12.5% of the bogus purchases considering profit element embedded. We found that the CIT(A) has dealt on the facts and considered the Hon'ble High Court decision and took a view. Further, We find the Jurisdictional Honble High Court in the case of Pooja Paper Trading Co. Vs. ITO, (104 taxmann.com 95) and Honble Gujarat High court in CIT Vs. Simit P Sheth (2013) (356 ITR 451) has upheld the disallowance @ 12.5% on such purchases. At this juncture, we consider it appropriate to refer to the findings of the CIT(A) on all the grounds of appeal at page 81 to 95 of the order read as under:

*19.0 I have considered the facts of the case, submissions of the Appellant, the observations of the AO contained in the assessment order and the other materials placed on record on this issue. I find that, all the aforesaid grounds of appeal pertain to the issue of disallowance of purchases and therefore, the same are being taken-up collectively for adjudication.*

*19.1 The facts of the case are that, a search and seizure operation was carried out by the Income Tax Department*

*u/s. 132 of the Act on 29.04.2014 in the case of the Appellant Company and its associate concerns. During the course of the said search operation, certain incriminating documents were found and confessional statements were recorded u/s 132(4) of the Act on the issue of bogus purchases, which are briefly commented upon in the ensuing paragraphs.*

*19.2 It was a categorical finding of the search operation that there exist discrepancies in certain purchases made by the Appellant Company and they lacked proper documentation. Further, it was revealed that the Appellant Company is not follow the Standard Operating Procedures (SOP), while making bogus / tainted purchases. It was also found during the search that certain purchases were sourced from parties, whose identity and genuineness was not verifiable and therefore remained doubtful.*

*19.3 Further, on the verification of the vendor list maintained by the Appellant Company, it was noticed that names of many of these concerns was reflected in the list of hawala/ suspicious dealers', who were found to have issued false/ bogus bills without delivery of goods on the website of Maharashtra Sales Tax Department.*

*19.4 I have also noted that during the course of the search proceedings, statement of Shri Pinaki Bosu, Head of the Purchase Department was recorded on oath u/s 132(4) of the Act, who had in his reply to Q. No. 24 & 25 categorically admitted that no purchases have been made from the parties, whose name are not appearing in the purchase list maintained on ERP System. Similarly, Shri B Venkataraman, Ex Vice-President (Projects) of the Appellant Company in his statement recorded u/s 132(4) of the Act had admitted to the discrepancies in the purchases made by the Appellant Company.*

19.5 Shri Rajeev Ashok Piramal, Vice Chairman and Managing Director of the Appellant Company on being confronted with the above discrepancies and findings of the search operation had in his statement recorded u/s 132(4) of the Act on 30.04.2014 accepted the discrepancies in certain purchases made by the Appellant Company and declared additional income in respect of purchases for the A.Y. 2008-09 to A.Y. 2014-15 in the hand of various Group Concerns.

19.6 I have noted that the Appellant Company had filed retraction affidavits of Shri Rajeev Ashok Piramal, Vice Chairman and Managing Director, Pinaki Ranjan Bosu, Head of Purchase Department and Mr. Bharat Sanghavi, Chief Financial Officer (CFO) of the Appellant Company, which are entirely self-serving in nature. The much delayed retraction before the AO clearly shows that it is an after-thought. Further, no valid reasons had been mentioned in the impugned affidavits, for retracting from the confessional statement.

19.7 In view of this factual matrix, during the course of assessment proceedings, the AO in order to verify the identity and genuineness of the purchase parties had issued notices u/s 133(6) of the Act to the parties from whom purchases were made for the year under consideration. On the basis of the replies received from such parties, the AO had decided the nature and quantum of disallowance to be made on account of bogus purchases.

19.8 In the cases, where the purchase parties had replied to the notice issued u/s 133(6) of the Act, the AO had held that it would be just and proper to disallow 10% of the amount of purchase. Further, in cases where the Appellant was able to produce the purchase parties, the AO had again disallowed 10% of the bogus purchases. I am

*constrained to note that it is not at all clear from the assessment order, as to what were the reasons with the AO for making disallowance of 10% of bogus purchases, if the parties have duly responded to the notices u/s 133(6) of the Act or their statements had been recorded by him during the course of the assessment proceedings. The AO had failed to bring any adverse material on record against the purchase parties, who have either responded to notice u/s 133(6) of the Act or subjected themselves for examination before the AO during the course of the assessment proceedings.*

*»19.9 With respect to the purchase parties, who have responded to the notices u/s 133(6) of the Act, I have noted that voluminous material evidences have been supplied to the AO, which had not been rebutted by the AO at all. The AO had in the assessment order himself admitted that replies were received by him along with confirmatory ledger accounts in case of purchase parties namely, M/s KRC Trading Company Pvt. Ltd., M/s Rahul Traders and M/s Arihant Traders. I have taken note of the fact that, when replies are received by the AO, it had established the identity of the party and the genuineness of the transaction is also established, unless the same is rebutted by the AO. Further, the accompanying confirmatory ledger account filed by such party proves that the transaction entered into by the Appellant with such party is bonafide, verifiable and genuine, unless the AO is able to bring material contrary to that.*

*19.10 Further, I find that merely because the suppliers did not appear before the AO, one cannot adjudge these parties to be bogus in nature and conclude that the purchases were not made by the Appellant company. In the present case at hand, I have noted that though the party had not physically appeared before the AO, but had duly replied to*

*the notice u/s 133(6) of the Act. The Hon'ble Bombay High Court in the case of Nikunj Eximp Enterprises Pvt. Ltd reported in 35 taxmann.com 384, had held that where sales are supported by the purchases and the payment was made through banks, merely because suppliers had not appeared before AO, the purchase could not be rejected as bogus. The relevant extract of the said decision is reproduced as under:-*

*"In our view, merely because the suppliers have not appeared before the Assessing Officer or the CIT(A), one cannot conclude that the purchases were not made by the respondent-assessee. The Assessing Officer as well as CIT(A) have disallowed the deduction of Rs.1.33 crores on account of purchases merely on the basis of suspicion because the sellers and the canvassing agents have not 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.1.33 crores was not bogus. No fault can be found with the order dated 30-04-2010 of the Tribunal."*

*19.11 In view of the above facts and circumstances, I am of the considered opinion that, where the replies to the notice u/s 133(6) of the Act were received by the AO, no disallowance @ 10% of the purchases is called for. To buttress, this conclusion, it is pertinent to bring on record, the conclusive finding of the AO in Para 5.4 of the assessment order, wherein the AO had blown hot and cold in the same breath. The relevant conclusive portion of the assessment order in this regard is reproduced hereunder, for ready reference:-*

*"5.4 The fact of the matter is that the assessee had taken just accommodation entry i.e. no genuine transaction has taken place in the extant case coupled with the fact that*

*the direct and indirect expenses related to such sham transaction cannot be quantified. But, at the same time, it cannot be denied that replies were filed by the above mentioned parties ratifying the transactions with the assessee company.....*

*It is clear from the above conclusive comments of the AO that such parties have duly ratified the transaction of purchase with the Appellant Company. Hence, no adverse material had been brought on record by the AO to justify the disallowance @ 10% of the impugned purchases. Mere suspicion, however strong or probable it maybe, is no effective substitute for the legal proof required to substantiate a charge, which the learned AO has failed to furnish. There is a long mental distance between 'may be true' and 'must be true' and "this basic and golden rule helps to maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of a dispassionate judicial enquiry based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of evidence brought on record. Reliance is placed on Ashish Batham v. State of MP, AIR 2002 SC 3206. It is a trite law that the suspicion howsoever strong cannot partake the character of legal evidence. Reference in this regard is made to the decision of Hon 'ble Supreme Court in the case of Lalchand Bhagat Ambica Ram vs. CIT [37 ITR 288 (SC)J. The court should safeguard itself against the danger of basing its conclusions on suspicions, howsoever strong they may be. It is equally well settled that the Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. Mere suspicion, however strong, cannot take the place of proof. Reliance is placed upon State v. Gulzari Lal Tandon AIR 1979 S.C. 1382 and J.A. Naidu v. State of Maharashtra AIR 1979 S.C. 1537.*

19.12 I have also taken note of the fact that the AO had recorded the statement of one Shri Rajesh Mehta for Karma Ispat Ltd, who had appeared before the AO and affirmed the transactions undertaken with the Appellant Company. It is pertinent to note that such an affirmation was recorded by the AO u/s 131 of the Act. It needs to be appreciated that the said party had filed evidences such as return of income, audit report, Balance Sheet and Profit and Loss account to prove their identity and genuineness of the transaction. In view of the above facts and circumstances, I am of the considered opinion that, where the purchase party itself has appeared before the AO and confirmed the transactions with the Appellant for the year under consideration, no disallowance @10% of the purchase is called for.

19.13 The Hon'ble Gujarat High Court had in the case of Principal Commissioner of Income Tax, Surat-I Vs. Tejua Rohitkumar Kapadia (2018] 94 taxmann.com 324 (Gujarat) held that when there was no evidence to show that the amount has been recycled back to the assessee, the assessing officer was not justified in treating the said purchases as bogus u/s 69C. The relevant part of the decision is reproduced below:-

"It can thus be seen that the appellate authority as well as the Tribunal came to concurrent conclusion that the purchases already made by the assessee from Raj Impex were duly supported by bills and payments were made by Account Payee cheque. Raj Impacts also confirmed the transactions. There was no evidence to show that the amount was recycled back to the assessee. Particularly, when it was found that the assessee the trader had also shown sales out of purchases made from Raj Impex which were also accepted by the Revenue, no question of law arises.

19.14 This matter had travelled to the Hon 'ble Supreme Court in the case of Principal Commissioner of Income Tax, Surat-1 Vs. Tejua Rohitkumar Kapadia [2018] 94 taxmann.com 325 (SC), wherein the Hon'ble Apex Court had affirmed the decision of Hon'ble Gujarat High Court that where purchases made by assessee-trader were duly supported by bills and payments were made by account payee cheque, seller also confirmed transaction and there was no evidence to show that amount was recycled back to assessee, Assessing Officer was not justified in treating said purchases as bogus under section 69C of the Act.

19.15 In cases, where no reply to the notice u/s 133(6) of the Act was received from purchase parties, the AO have held that there was no movement of goods. Accordingly, it was held that such purchases are bogus in nature and the entire amount of purchases were disallowed by the AO. Thus, the AO had made full disallowance, where no reply was received from purchase parties, namely M/s Trimurti Enterprises, M/s Ellero Trading Company, M/s J.K. Enterprise, M/s RK Ispat, M/s Pooja Enterprises (Capital Cinema), M/s V3 Enterprises and M/s Bharat Steel to whom notices were issued u/s 133(6) of the Act.

19.16 I am in conformity with the opinion of the AO that the parties which have not responded to the notices u/s 133(6) of the Act and which have not been produced by the Appellant before him for verification remains doubtful and necessary consequences for the same needs to follow. I have also noted that in the concluding paragraph 5 of the assessment order, the AO had categorically stated that the Appellant had submitted project wise quantitative details of consumption of the items purchased. The AO had not pointed out any shortcoming / defects in the said quantitative consumption placed on record by the Appellant company. I have also noted that the sales of the Appellant

*Company had not been doubted by the AO in the assessment order. In view of these facts and circumstances, only the profit element contained in the bogus purchases needs to be taxed in accordance with several judicial precedents.*

*19.17 I have noted that the issue of bogus purchases is not a new one and has come up for consideration before many Courts and these binding judgments needs to be taken into consideration, while deciding the present case at hand. In the case of Bholanath Polyfab P. Ltd. (2013) 355 ITR 0290 (Guj), the Hon'ble Gujarat High Court had held that where the goods were purchased by the assessee, may be not from the parties shown in the accounts but from other sources, in that case not the entire amount covered under such purchase, but the profit element embedded therein would be subject to tax. The relevant portion of the judgment is reproduced hereunder:-*

*"5. Having come to such a conclusion, however, the Tribunal was of Tribunal adverted to the facts and data on record and came to the conclusion that the entire quantity of opening stock, purchases and the quantity manufactured during the year under consideration were sold by the assessee. Therefore, the purchases of entire 102514 meters of cloth were sold during the year under consideration. The Tribunal, therefore, accepted the assessee's contention that the finished goods were purchased by the assessee, may be not from parties shown in the accounts, but from other sources. In that view of the matter, the Tribunal was of the opinion that not the entire amount, but the profit margin embedded in such amount would be subjected to tax The Tribunal relied on its earlier decision in the case of M/s.Sanket Steel Traders and also made reference to the Tribunal's decision in the case of Vijay Protiens.*

6. We are of the opinion that the Tribunal committed no error. Whether the purchases themselves were bogus or whether the parties from whom such purchases were allegedly made were bogus is essentially a question of fact. The Tribunal having examined the evidence on record came to the conclusion that the assessee did purchase the cloth and sell finished goods. In that view of the matter, as natural corollary, not the entire amount covered under such purchase, but the profit element embedded therein would be subject to tax. This was the view of this Court in the case of *Sanjay Oilcake Industries v. CIT*, 316 ITR 274 (Guj.). Such decision is also followed by this Court in a judgment dated 16.8.2011 in Tax Appeal No.679 of 2010 in the case of *CIT v. Kishor Amrutlal Patel*.

*In the result, tax appeal is dismissed."*

19.18 Further, in the case of *CIT v Simit P. Sheth*, 355 ITR 290 (Guj), the Hon'ble Gujarat High Court has held that in the case of bogus purchases, it is vital to ascertain whether purchases were totally non-existent or were actually made, but from grey market without proper billing, instead of from parties from whom it was claimed to be purchased. Once it is clear that purchases were actually made, then only the profit embedded in it and not the price of bogus purchases could be added in the income of assessee. The relevant portion of the said judgment in this regard is reproduced hereunder:-

"5. We are broadly in agreement with the reasoning adopted by the Commissioner (Appeals) with respect to the nature of disputed purchases of steel. It may be that the three suppliers from whom the assessee claimed to have purchased the steel did not own up to such sales. However, vital question while considering whether the entire amount of purchases should be added back to the

*income of the assessee or only the profit element embedded therein was to ascertain whether the purchases themselves were completely bogus and non-existent or that the purchases were actually made but not from the parties from whom it was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation.*

*6. In the present case, CIT believed that when as a trader in steel the assessee sold certain quantity of steel, he would have purchased the same quantity from some source. When the total sale is accepted by the Assessing Officer, he could not have questioned the very basis of the purchases. In essence therefore, the Commissioner (Appeals) believed assessee's theory that the purchases were not bogus but were made from the parties other than those mentioned in the books of accounts.*

*7. That being the position, not the entire purchase price but only profit element embedded in such purchases can be added to the income of the assessee. So much is clear by decision of this Court. In particular, Court has also taken a similar view in case of Commissioner of Income Tax-IV vS. Vijay M Mistry Construction Ltd. vide order dated 10.01.2011 passed in Tax Appeal No. 1090 of 2009 and in case of Commissioner of Income Tax-I vs. Bholanath Poly Fab Pvt. Ltd. vide order dated 23.10.2012 passed in Tax Appeal No. 63 of 2012. The view taken by the Tribunal in case of Vijay Proteins Pvt. Ltd. Vs. CIT reported in 58 ITD 428 came to be approved.*

*8. If the entire purchases were wholly bogus and there was finding of fact on record that no purchase were made at all, counsel for the revenue would be justified in arguing that the entire amount of such bogus purchases should be added back to the income of the assessee. Such were the*

*facts in case of ACIT (OSC) Ward 5(3) Nadiad Vs. Pawanraj B Bokadia (supra)."*

*19.19 In the case of CIT Vs Satyanarayan P. Rathi (2013) 351 ITR 0150, the Hon"ble High Court of Gujarat has held as under:-*

*"5. From the record, we noticed that the Commissioner (Appeals) as well as the Tribunal found that the purchase of raw-material, in which the assessee was trading, were only made, but not from the disclosed sources. In other words, the case against the assessee was that the purchases were made in the grey market through cash payment and some entries were obtained from certain suppliers who had not sold such goods.*

*6. The present case, thus, being one of only purchase but not from disclosed sources, it would be only profit element embodied in such purchase which could be added in the income of the assessee and thus, rightly so done by the Commissioner(Appeals) and the Tribunal.*

*7. If this be our conclusion, only question arises whether such profit element should be estimated at the rate of 30 percent or 12 1/2 percent. Whenever such a question arises, some reasonable estimation is always permissible. Hardly any question of law on such aspect would arise. Merely, it is pointed out that the assessee was a trader and that the Tribunal retained 12 1/2 percent of the purchase towards its possible profit, we do not find any reason to entertain the appeal. In the result, Tax Appeal is dismissed."*

*19.20 In the case of PCIT Vs M/S. Mohommad Haji Adam & Co. (Bombay High Court) the facts were that the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. Further, the A.O.*

*had held that the purchases made by the assessee from these entities were bogus. The finding of the CIT(A) and the Tribunal suggested that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Hon'ble High court held that the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in the case of a trader. 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 relevant excerpts of the judgment dated 11.02.2019 of the Hon'ble Bombay High Court are reproduced hereunder:-*

*"8 In the present case, as noted above, the assessee was a trader 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 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 sales 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 trader. 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 as to costs." 19.21 Therefore, respectfully following the binding judgments of Hon'ble Court's referred supra, I hold that ends of justice will be met if a profit rate is applied in respect of suspected bogus purchases. As far as the profit rate to be applied is concerned, I have noted that there is a plethora of judgments, which have held that a profit rate of 12.5% of the bogus purchases is fair and just.*

*19.22 In the case of CIT v. Simit P. Sheth (2013) 356 ITR 0451 (Guj) the facts before the Hon 'ble Gujrat High Court were that the assessee was engaged in the business of*

trading in steel on wholesale basis and it filed the return for A.Y. 2006-07 declaring total income of Rs.1,95,500/-, which was accepted by the AO. Later, the AO received some information to the effect that certain suppliers of steel had made their statements on oath to the effect that they had not supplied steel to the assessee, but had only provided sale bills in lieu of small commission. Accordingly, the case was reopened by issue of notice u/s.148 on 28/3/2008. While completing the assessment, the AO added the entire amount of purchases of Rs.41,04,903/- from three parties, against which the assessee filed an appeal before the CIT(Appeals). The CIT(Appeals), while deciding the issue, observed that the assessee had made purchases from other parties in the open market and, therefore, he retained 30% of the purchase cost as estimated profit of the assessee and, therefore, upheld the addition to the extent of Rs.12,31,470/-only. The order of the CIT(Appeals) was challenged before the Hon'ble ITAT. The Hon'ble ITAT upheld the decision of the CIT(Appeals), but reduced the addition to the extent of 12.5% and, thus, granted further relief to the assessee. On the appeal of the department, the Hon'ble Gujarat High Court on this issue has observed as under :-

" 9. This being the position, the only question that survives is what should be the fair profit rate out of the bogus purchases which should be added back to the income of the assessee. The Commissioner adopted ratio of 30% of such total sales. The Tribunal, however, scaled down to 12.5%. We may notice that in the immediately preceding year to the assessment year under consideration the assessee had declared gross profit @ 3.56% of the total turnover. If the yardstick of 30%, as adopted by the Commissioner, is accepted GP rate will be much higher. In

*essence, the Tribunal only estimated the possible profit out of purchases made through non-genuine parties. No question of law in such estimation would arise. The estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick can be adopted.*

*19.23 In this context, the reliance is placed on the decision in the case of Assistant Commissioner of Income Tax, Mumbai Vs. Haware Construction (P.) Ltd. [2019] 101 taxmann.com 168 (Mumbai - Trib.), wherein the Mumbai, ITAT C' Bench on similar facts held that disallowance should be restricted to 12.5% of the disputed purchases. The relevant excerpts of the said judgment are reproduced hereunder:-*

*"3.5 We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below. The assessee failed to file evidence of deliveries like Vajan Kata/transporters bilty etc. to establish that the material had been physically delivered in its premises. However, we find that the AO has failed to find any fault on the sales made by the assessee. In the case of Simit P. Sheth (supra), the Hon'ble Gujarat High Court has held that where purchases were not bogus but were made from parties other than those mentioned in the books of account, not entire purchase price but only profit element embedded in such purchases can be added to income of the assessee. The Hon'ble High Court referred to a similar view taken in the case of CIT v. Vijay M. Mistry Construction Ltd. [2013] 40 taxmann.com 22/219 Taxman 145 (Mag.)/355 ITR 498 (Guj.) and CIT v. Bholanath Poly Fab (P.) Ltd. [2013] 40 taxmann.com 494/[2014] 220 Taxman 82 (Mag.)/[2013] 355 ITR 290 (Guj.).*

*Therefore, the Id. CIT(A) has rightly directed the AO to restrict the disallowance to 12.5% of the disputed purchases. We uphold the order of the Id. CIT(A) and dismiss the 1st ground of appeal filed by the revenue."*

*19.24 In view of the various judicial pronouncements discussed above, it is fair and just to apply a profit rate of 12.5% on the bogus purchases, wherein there is neither any reply to notice u/s 133(6) of the Act nor the parties have been produced by the Appellant before the AO to cover-up all the possible lapses and discrepancies in the said tainted purchases.*

*19.25 To sum up, after going through the entire material on record, I am of the considered opinion that there is no occasion to make a disallowance of 10% of the suspicious purchases, where the AO had received information u/s 133(6) the Act. Also, in the cases where the purchase parties were produced before the AO for examination, it is wrong on the part of the AO to draw adverse inference and tax 10% of the tainted purchases, without bringing any additional material on record. I have also noted that the Appellant Company has given certain details from the website of Maharashtra Sales Tax Department, viz. WWW.mahawat.gov.in for justifying that the tainted purchases added by the AO are not featuring in the list of hawala/suspicious dealers.*

*19.26 Accordingly, the AO is directed to (delete the disallowance made by the AO worked out (@10%) in case of parties who had (responded to notices u/s (133(6)) of the Act or have been produced before the AO for examination) Further, the AO is directed to make a disallowance @ 12.5% of the bogus purchases, if the parties had neither responded to the notices u/s 133(6) of the Act nor have been produced before the AO for examination. The*

*disallowances on account of purchases worked out in such manner needs to be taxed, as per the Revenue Recognition method (As per the % of Work Completed) adopted by the Appellant, which is not under dispute. To sum up, the AO is directed to give effect to the above decision on bogus purchases for the current and the latter assessment years, if required, in a manner similar to that had been done in the assessment order passed by him.*

*19.27 Hence, the Ground of Appeal No. 2 & 5 raised by the Appellant are partly allowed and Ground of Appeal No. 3 & 4 are allowed*

9. We find that the Ld.CIT(A) took a reasonable view that the only profit percentage has to be added and estimated @ 12.5% of bogus purchases. The Ld.DR could not controvert the observations of the Ld. CIT(A) with any new cogent evidence and material to take a different view. We are of the opinion that the CIT(A) dealt on the facts and considered the profit element in the bogus purchases and also the A.O has not disputed the sales. The Ld.CIT(A) has relied on the decisions of Hon'ble High Court and passed a reasoned order. Accordingly, we do not find any infirmity in the order of the CIT(A) and uphold the same and dismiss the grounds of appeal of the revenue.

10. In the result the appeal filed by the revenue is dismissed.

**ITA No. 5633/Mum/2019, A.Y 2010-11**

11. As the facts and circumstances in this appeal are identical to ITA No. 5632/Mum/2019, for A.Y 2009-10(except variance in figures) and the decision rendered in above paragraphs would apply mutatis mutandis for this case also. Accordingly, the grounds of appeal of the revenue are dismissed.

12. In the result, both the appeals filed by the revenue are dismissed.

Order pronounced in the open Court on 28.07.2022

Sd/-  
(S RIFAUR RAHMAN)  
**ACCOUNTANT MEMBER**

Sd/-  
(PAVAN KUMAR GADALE)  
**JUDICIAL MEMBER**

Mumbai, Dated 28.07.2022  
KRK, PS

Copy of the Order forwarded to :

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

//True Copy//

आदेशानुसार / BY ORDER,