

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, HON'BLE JUDICIAL MEMBER AND
DR. A. L. SAINI, HON'BLE ACCOUNTNAT MEMBER
(Physical Court Hearing)**

| Sl. No. | ITA No. | Asst. Year | Name of Appellant | Name of Respondent |
|---------|-------------|------------|-------------------------------|---|
| 1. | 87/SRT/2017 | 2007-08 | The ITO, Ward-2(3)(8), Surat. | Rajesh Kumar Pamecha, Pamecha Bhawan, Shitala Mata Ki Gali, Bijai Nagar, Ajmer, Rajasthan. PAN: AEZPP6573L |
| 2. | 15/SRT/2020 | 2008-09 | The ITO, Ward-2(3)(8), Surat. | Mukesh Mahavirprasad Sen, 6/1862-63, 3 rd Floor, Office No.305, Ghanshyam Bhuvan, Balisheri, Mahidharpura, Surat – 395003. PAN: BCSPS0173F |
| 3. | 16/SRT/2020 | 2009-10 | The ITO, Ward-2(3)(8), Surat. | Mukesh Mahavirprasad Sen, 6/1862-63, 3 rd Floor, Office No.305, Ghanshyam Bhuvan, Balisheri, Mahidharpura, Surat – 395003. PAN: BCSPS0173F |
| 4. | 21/SRT/2020 | 2008-09 | The ITO, Ward-2(3)(7), Surat. | Anshuman Ramdayalji Kumawat, Prop of Anchal Diamonds, 7/3905, 102 Malar Sheri, Akash Ganga, Rughnathpura, Surat – 395003. PAN: ARHPK4543J |
| 5. | 22/SRT/2020 | 2009-10 | The ITO, Ward-2(3)(7), Surat. | Anshuman Ramdayalji Kumawat, Prop of Anchal Diamonds, 7/3905, 102 Malar Sheri, Akash Ganga, Rughnathpura, Surat – 395003. PAN: ARHPK4543J |

| | |
|-------------------------------|--|
| Date of Hearing: | 04/01/2023 |
| Date of Pronouncement: | 13/01/2023 |
| Appellant by: | Shri Rohit Vijayvargiya, CA |
| Respondent by: | Shri Ashok B. Koli, CIT(DR) with Shri Vinod Kumar, Sr. DR |

आदेश / ORDER

PER DR. A. L. SAINI, AM:

Captioned five appeals filed by the Revenue, pertaining to the different assesseees and different assessment years (AYs). 2007-08 to 2009-10, are directed

against the separate orders passed by the Learned Commissioner of Income Tax (Appeals), Surat [in short “the Id. CIT(A)”], which in turn arise out of separate assessment orders passed by the Assessing Officer u/s 144/143(3) r.w.s 147 of the Income Tax Act, 1961 [hereinafter referred to as the “Act”].

2. Since, the issues involved in all the appeals of Revenue are common and identical; therefore, these appeals have been heard together and are being disposed of by this consolidated order. For the sake of convenience, the grounds as well as the facts narrated in ITA No.15/SRT/2020 for AY.2007-08, have been taken into consideration for deciding the above appeals *en masse*.

3. The grounds of appeal raised by the Revenue as per lead case, in ITA No.15/SRT/2020 for AY.2008-09, are as follows:

“(i) On the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.20,48,83,051/- made on account of bogus purchase and instead erred only in upholding commission income @ 0.50% of the Rs.20,95,86,838/- whereas the assessee was engaged in bogus purchase from four concerns controlled by the entry provider.

(ii) On the facts and in the circumstance of the case and in law, the Ld. CIT(A), while accepting the figure of bogus purchases at Rs.20,95,86,838/- erred thereafter by not enhancing the addition to the extent of differential amount of Rs.47,03,787/- [Rs.20,95,86,838 - Rs.20,47,83,051/- (figure of bogus purchases adopted by the AO)].

(iii) On the facts and in the circumstance of the case and in law, the Ld. CIT(A) has erred in giving relief on the basis of decision in the case of the assessee for the A.Y. 2007-08 quoting involvement of same parties whereas the parties in the year under consideration involved one more party namely M/s Parshwanath Gems Pvt. Ltd.

(iv) On the facts and in the circumstance of the case and in law, the Ld. CIT(A) has failed to appreciate the fact that the entire purchase from alleged concerns to the extent of Rs.20,95,86,838/- were bogus and it was only to suppress the profit of the beneficiaries which has been duly substantiated by the statement on oath given by the entry provider.

(v) On the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in appreciating the fact that the concerns like M/s. Mihir Diamonds, M/s. Krishna Diam, M/s Parshwanath Gems Pvt. Ltd. and M/s. Karishma Diamonds Pvt. Ltd. from which the assessee made the said purchases amounting to Rs.20,95,86,838/-, were nonexistent entities and they were used for providing bogus purchase bills to the assessee. The entire modus operand/ of such bogus transactions was accepted in statement u/s. 132(4) of the Act by the respective

key persons of Shri Gautam Jain Group in light of the various documents/evidences found and seized from their premises.

Therefore, CIT(A) should have treated whole amount of these purchase as income of the assessee as assessee reduced his income to this extent by inflating his purchases to this amount in his P&L account.

(vi) On the facts and circumstances of the case and in Law, the Ld. CIT(A), Surat ought to have upheld the order of the Assessing Officer. It is, therefore, prayed that the order of the Ld. CIT(A)-I, Surat may be set-aside and that of the Assessing Officer's order may be restored.

(vii) On the facts and circumstances of the case and in law, the appellant craves its right to add, alter, amend, deleted, any of the ground of grounds of appeal.”

4. Brief facts *qua* the issue are that assessee has filed original return of income for AY.2008-09, declaring total income at Rs.1,34,560/- on 21.08.2008. In assessee's case, an information was received from the DIT(Inv), Mumbai that assessee was one of the beneficiaries of bogus purchase bills provided by Gautam Jain Group during the previous year relevant to assessment year under consideration. Accordingly, it was construed that the income to the extent of purchase from such parties has escaped assessment within the meaning of section 147 of the Act, which lead into invoking of provisions of section 147 followed by issuance of notice u/s. 148 of the Act after recording reasons for such reopening of assessment as required under these provisions. Accordingly, notice u/s. 148 dated 31.03.2015 was issued and served upon the assessee. The assessment was reopened by the AO by recording reasons. The assessment was reopened after examining the information received from the DIT (Inv), Mumbai and recording satisfaction for reopening by the AO. A search and seizure action was conducted in the premises of Shri Gautam Jain and his group concern on 03.10.2013 by the DGIT (Inv), Mumbai. During the course of search proceedings, it was established that the group concerns are all paper companies/firms, / proprietorship concern with no real business activities, operating solely with the purpose of facilitation of fraudulent financial transactions which includes, providing accommodation entries in the form unsecured loans to interested parties, issuing of bogus sales/purchase bills to various parties and providing a bogus front to concerns which do not want to import diamonds in their own hands. Ongoing through the

documents forwarded by the DIT(Inv), Mumbai, it was found by Assessing Officer that the assessee has obtained accommodation entries of bogus purchase from the concerns of Shri Gautam Jain, during the financial year 2007-08 relevant to AY.2008-09, the details of which is given as under:

| Sr. No. | Name of the Entry Provider | Amount (Rs.) |
|---------|------------------------------|----------------|
| 1 | M/s Karishma Diamond P. Ltd. | 6,04,13,365/- |
| 2 | M/s Parshwanath Gems P. Ltd. | 3,07,13,636/- |
| 3 | M/s Mihir Diamond | 6,06,44,332/- |
| 4 | M/s Krishna Diam P. Ltd. | 5,31,11,718/- |
| | Total | 20,48,83,051/- |

5. Assessing Officer noted that during the course of search action, it was revealed that the said group is exclusively engaged in the business of issuing non genuine purchase bills and also unsecured loan accommodation entries to various parties. It is thus established from the search and seizure action that the alleged concerns of Gautam Jain Group are all paper companies/proprietorships and with no real business activities, operating solely with the purpose of facilitation of fraudulent financial transactions which includes providing accommodation entries in the form of unsecured loans to the interest parties, issuing of bogus sale/purchase bills to various parties etc. During the course of search and seizure action in the case of Shri Gautam Jain Group of cases on 03.10.2013 by the DGIT(Inv), Mumbai, it was found that there are names sake dummy directors/partners/proprietors/brokers etc. These concerns were being actually managed by Shri Gautam Jain & others. These group concerns were believed to be concerns actively involved in providing non-genuine purchase bills and also unsecured loan accommodation entries to various interested parties. As a result of the search and seizure action, it was conclusively proved that these diamond concerns are only on paper base with no real business activities. Findings of the search action on Shri Gautam Jain & others reveals that Shri Gautam Jain and associates manage, control and operate numerous concerns in the name of various persons who are shown as name-sake directors, partners and proprietors through which they provide accommodation entries of loans and advances, purchase and sale and unsecured loans to various parties / beneficiaries. The name-sake

/dummy Directors/ proprietors / partner of all these concerns admitted on oath that they were merely employees of Gautam Jain and others and were looking after miscellaneous office work like depositing cheques in banks, handling over parcels to clients, making data entry etc.

6. Since these persons were employees and were associated with the office work, they do have perfunctory knowledge about the nature of business activity of the concerns in which they are shown as Directors, partners and proprietors. However, all of them do not have any technical or in depth knowledge of diamond industry like assorting cutting, manufacturing etc. All these dummy directors/partners/proprietors were paid salary not profit/remuneration. These dummy directors/partners/proprietors were paid salary mostly in cash. At times the salary was disbursed to them on need basis, as and when required. It was observed that the profit of the concerns in which employees are shown as directors, partners and proprietors are maintained more or less equivalent to their annual salary. In the regular books of the said concerns, the profit is shown to be appropriated by the concerns and for doing miscellaneous office work, looking after banking transactions and data entry of the accounts etc. From the above, it clearly indicates that these employees are completely dependent on Gautam Jain and others and have no stake whatsoever in the business of the concerns in which they were shown as directors, partners and proprietors and it was the later who manage the business affairs of all the concerns with whom these employees have lent their name. All the concerns are shown to be engaged in import of diamonds. However, when these name-sake directors/partners/proprietors were specifically asked to explain as to how they contacted the parties from whom the imports have been made in the respective concerns, they were unable to comment on the same. They all admitted of not having any personal contact with any of the importers either through phone or email. The facts mentioned above prove that these employees have never made any import on their own and all the imports in the concerns in which they are shown as directors, partners and proprietors and are made at the direction of Gautam Jain. All the employees, in their respective

statement recorded u/s. 132(4) and u/s. 132 of the IT Act have accepted and admitted that they are merely dummy directors / partners / proprietors List of group concerns operated and managed by Gautam Jain was obtained from him.

7. The Assessing Officer noted that all these group concerns were shown to be in the business of import and export of diamonds. All of them have license which make them eligible for importing diamonds. Further, data collected from customs department had revealed that all the said group concerns have genuinely been importing diamonds for last many years. The imported diamonds were also getting cleared by the CHAs. It prima facie gives an impression that all the group benami concerns were indeed in the business of import of diamond and its subsequent exports (which is a miniscule amount) and local sale. However, many evidences were found during the course of search which proved that these concerns were not into any genuine business. Such findings are enumerated below:

- **No stock of diamond found:** During the course of search, all the registered offices, business premises, business and residential premises of various dummy directors, partners and proprietors including that of Gautam Jain, and were covered. At none of these premises, any stock of diamond trade, at a given point of time would at least have some stock of diamond available. However, the fact that none of the group concerns had any stock of diamonds as on 03.10.2013 i.e the day when search commenced raises a suspicion with regard to genuiness of business activity of these group concerns.
- **Books of accounts not maintained at the respective registered offices:** The registered offices and residential premises of the said group concerns and the Gautam Jain and others in Mumbai and Surat were covered during the search action. However, the Income Tax Authorities did not find any books of account of the said group benami concerns at any of the premises.

8. During the course of search, evidences were found; persons were examined on oath which established that Gautam Jain and others have been using group benami concerns to give accommodation entries in the nature of bogus purchase and bogus unsecured loans to various beneficiaries. There are many players in the diamond market who purchase diamond from the grey market and are in need of bogus purchase bills to regularize the corresponding sale. Further, there are others who want to take accommodation entries of bogus purchases expenses. All such parties approach the Gautam Jain to get bogus import diamonds on behalf of real importers to whom these diamonds are handed over out of books. But in the regular books of accounts of the benami concerns, the imported diamonds still appears as stock (bogus). This is the reason why during the search no stock of diamond was found from any of the residential or business premises of the assessee and his employees. Against this bogus stock, bogus sale bills are issued to beneficiary parties who are in need of taking accommodation entries for bogus purchase. The above finding of the investigation wing as summarized above clearly established the bogus nature of the transactions entered into by the Gautam Jain Group. It also establishes that forming of basis for reopening of the case was substantive and not based on mere belief. The investigation wing has carried out thorough investigation and established beyond doubt that the transactions are bogus. In response to the notice issued by the undersigned, the assessee vide letter dated 24.07.2015 requested to treat the original return of income filed on 21.08.2008, as return of income filed in response to notice under section 148 of the Act. Notice under section 143(2) of the Act dated 15.12.2015 was issued and served upon the assessee. Notice under section 142(1) was also issued along with the detailed questionnaire to the assessee calling for various details, clarifications etc. In response to the notices issued, the assessee has filed the details called for. The details are placed on the record. The assessee firm was engaged in the business of trading in diamonds. During the assessment proceedings, as requested by the assessee, reasons for reopening were provided. After receiving the same, the assessee had filed his objections for reopening, which were duly settled by passing a Speaking Order.

9. Further, a show cause notice was issued by Assessing Officer on 07.03.2016, the same is reproduced below:

2. In your case, on verification of the details and submission made by you, it is seen that you have made transactions with parties which were benami concerns, run and operated by Shri Gautam Jain & Other group of cases of Mumbai wherein information has been received from the Investigation Wing, Mumbai that a search and seizure action was carried out by the Investigation Wing, Mumbai on 03.10.2013, which resulted in collection of evidences and other findings, which conclusively proved that the said Shri Gautam Jain & Other group of cases, through a web of benami concerns, run and operated by them, provided accommodation entries to various parties in respect of bogus unsecured loans and bogus purchases/ sales. Various evidences were found and seized from the premises of the said Shri Gautam Jain & Other group of cases. Thus, these diamond concerns are only on papers with no real business activities of diamond.

3. These groups were indulged in giving such accommodation entries and the directors / proprietors of such paper companies / concerns admitted the entire nature of bogus transactions in their statements recorded on oath. The investigations made by the Investigation Wing revealed that actual importers of rough diamonds import part of their diamond requirement through benami entities operated by Shri Gautam Jain & Other group of cases, which ensures benefit of suppression of turnover, profits and capital requirement of the former. It was also established during the search that these concerns import rough diamonds in their hands at the behest of third persons/interested parties. The consignments are sent on credit by the suppliers in the names of these benami entities at the instance of the actual importers and on receipt of the imported consignments from Customs, through CHA, the consignment is handed over to the actual importer and the bogus stock is entered in the books of the benami entities of Shri Gautam Jain & Other thereafter issue 'bogus sale bills against the bogus stock'. Thus, all the entities of Shri Gautam Jain & Other group of cases was operated solely with the purpose of facilitation of fraudulent transactions which includes providing accommodation entries of unsecured loans and bogus sale / purchase bills to interested parties. Thus, such entities of this group provides a bogus front to the diamond concerns, who do not want to import diamond in their own hands or through their books of account.

4. Since the evidential and material facts found during the course of search and survey in the case in Shri Gautam Jain & Other group of cases prove giving of accommodation entries of Rs.20,48,83,051/- to you, it is prima facie apparent that you have utilized such bogus transactions to suppress your profits for the year to that extent. There is no other prudent use of bogus transaction bills. On perusal of the evidences, the following facts emerged:

- > No Stock of diamond found: During the course of search, the offices, business premises, business and residential premises of various dummy directors, partners and proprietors

were covered. At none of these premises, any stock of diamond trade, at a given point of time would at least have some stock of diamond available.

- Books of accounts not maintained at the respective registered offices: The offices and residential premises of the Group were covered during the search action. However, the team of the Income Tax Authorities did not find any books of account

5. It is important here to discuss the Modus Operandi of giving Accommodation Entries.

- a. Actual importers of rough diamonds import part of their diamonds through the benami concerns operated by Gautam Jain and Family with a view to suppress their turnover, profits and capital requirement. The consignments are sent on credit by the suppliers in the names of the benami concerns at the instance of the actual importer. On receipt of consignments by these benami concerns, the diamond is handed over to the real importer as soon as the same is cleared by Customs through CHA (Clearing House Agents) thereby creating a bogus stock in the books of the benami concerns. This transaction is not recorded in the regular books of accounts of either the real importer or the benami concerns.
- b. Against the bogus stock, bogus sale bills are issued to the processing houses in diamonds which are engaged in cutting and polishing of diamonds/ traders who usually buy rough diamonds from undisclosed parties in cash and require purchase bills to balance their accounts and to circumvent provisions of section 40A(3) of the Income Tax Act, 1961. Bogus bills of purchase of diamonds (rough) are also taken by the diamond processing companies or traders who tend to inflate purchases and to defraud revenue by showing low profit. The processing houses / traders issue cheques to benami concerns against the bogus purchase bill taken. Since there is no genuine transaction of material hence the amount paid by cheque requires to be received back in cash. At this juncture, persons who want to plough back the undisclosed cash generated from their businesses, generally builders / real estate developers etc, approach these benami concerns for issue of cheque (as loan) against cash. These benami concerns issue cheques to them received from the processing houses / traders. Cash received from builders / person dealing in real estate is passed on to the diamond processors / traders. The settlement of cash takes place through Angadias.
- c. The last leg of the whole process is the return of loan by persons who have taken accommodation entry of loans and advances, generally builders / real estate developer through banking channel to these benami concerns who consequently make payment to the exporter in Europe who were appearing in the books of the benami concerns as 'creditors'. At this stage cash is received by these name lending concerns from the real importer at whose instance rough diamonds were imported in the first place is passed on to the person who had returned/repaid the loan through banking channel. Therefore, at no stage, cash is routed through the accounts of any of these benami concerns and entire cheque/RTGS transactions mentioned above are done through banking channels.

6. In the view of the defects pointed out as above that of bogus nature of purchase, I am of the opinion that the provision of section 145 (3) of the Act is directly applicable which read as follows:

"Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section(1) or accounting standards as notified under sub-section(2), have not been regularly followed by the assessee, the Assessing officer may make an assessment in the manner provided in section 144".

7. From the above details and evidences made available with this office, it is seen that the following entities of Shri Gautam Jain & Other group of cases have given accommodation entries of various bogus transactions as under, during F.Y.2007-08 to the assessee:

| Sr. No. | Name of the Entry Provider | Amount (Rs.) |
|---------|------------------------------|----------------|
| 1 | M/s Karishma Diamond P. Ltd. | 6,04,13,365/- |
| 2 | M/s Parshwenath Gems P. Ltd. | 3,07,13,636/- |
| 3 | M/s Mihir Diamond | 6,06,44,332/- |
| 4 | M/s Krishna Diam P. Ltd. | 5,31,11,718/- |
| | Total | 20,48,83,051/- |

8. Since the evidential and material facts found during the course of search and survey in the case in Shri Gautam Jain & Other group of cases prove giving of accommodation entries of Rs.20,48,83,051/- to you, it is prima facie apparent that you have utilized such bogus transactions to suppress the profits for the year to that extent. There is no other prudent use of bogus transaction bills.

9. During the assessment proceedings, in compliance to the assessee's request, a copy of detailed reason for reopening have been provided. The assessee has raised objection against the reason for reopening. Further, the assessee's objection has been disposed off by passing a speaking order. Various notices were issued and served upon the assessee and in response, the assessee has filed certain details. The details so filed are like of details which are generally filed in the course of normal scrutiny assessment proceedings. However, this office was in possession of the specific information that you have taken accommodation entries of bogus purchases from the above entities to the tune of Rs.20,48,83,051/- which is associated to the Shri Gautam Jain & Other group of cases. In view of the above facts, you are hereby requested to show cause as to why your books of accounts should not be rejected and the purchases from the above mentioned entities to the tune of Rs.20,48,83,051/- should not be treated as bogus purchases and added to your total income for A.Y. 2008-09.

10. In response to the show cause notice of the assessing officer, the assessee has furnished the reply, which is reproduced below:

"Assessee was in receipt of show cause notice dtd. 07.03.2016, proposing to make assessment u/s. 144 of the Act by adding add to my total income the alleged non-genuine transactions of Rs. 20,48,83,051/- from following concerns related to ShriGautam Jain and others.

| | | |
|----|-----------------------------|----------------|
| 1. | Karishma Diamonds Pvt. Ltd. | 6,04,13,365/- |
| | Parshwanath Gems Pvt. Ltd. | 3,07,13,636/- |
| 2. | Mihir Diamonds | 6,06,44,332/- |
| 3. | Krishna Diam Pvt. Ltd. | 5,31,11,718/- |
| | Total | 20,48,83,051/- |

Assessee had not carried out any transaction with the Krishna Diam Pvt. Ltd. and this was also mentioned in objection raised by the assessee.

With other three parties assessee had earned commission from these parties. Assessee was a commission agent (Pacca Aartiya) of rough and polished diamond in Surat making sales and purchases on behalf of some diamond traders for which assessee receive commission. The relationship between assessee and those traders is like that of agent and principal. According to accepted accounting practice the difference of sales and purchases is commission earned by a commission agent. Though sales and purchases are recorded in my books of accounts, but they were for inventory purposes and no trading account is made for that. Income and expenditure account is made where in commission income earned is credited and expenses incurred for earning commission income are debited. During the year under consideration assessee did business as commission agent in proprietary concern with name and style of M/s. Arpan Jewels.

During the year under consideration the assessee has made purchases and sales for some of his principals which includes the subjected parties M/s. Mihir Diamonds, M/s. Karishma Diamonds Pvt. Ltd. and M/s. Pashwanath Gems Pvt. Ltd. Assessee had followed the established accounting practice for consignment agent preparing his books of accounts and had recorded sales and purchases with these parties as consignment sales and purchases on which he has earned commission income only. The commission earned on transaction with the subjected parties are recorded in the books of accounts of the assessee and same is offered for taxation. We had already enclosed account confirmation along with copies of consignment purchase bills of above mentioned parties which confirms that genuine consignment purchases were made from above mention parties and same has also been recorded in books of account of the said parties also.

In point no. 4 of your show cause notice you have mention that evidential and material facts were found during the course of search and survey in case of Shri Gautam Jain, here we would like to say that we have been asking for the same documents and evidences which were found and were considered as base to form reason to believe for reopening of the assessee's case but till date assessee was not provided any of details on the basis of which case was reopened. Further we would like to say that in the same point you have mentioned two other things which are follows:

- You have mentioned that "No Stock of Diamond found" during the search operation.
 - You have also mentioned that "Books of accounts not maintained at registered offices".
- Here we have some questions whose answers are may be with you only.
- ❖ What is the connection in not finding any stock at ShriGautam Jain premises with the assessee's case?
 - ❖ Why does my books of accounts, register of purchase and sales for the purpose of maintenance of stock are not considered and importance and reference are given for ShriGautam Jain.
 - ❖ Your points do not stand anywhere in connection to assessee's case as you have not pointed out any direct connection of the assessee with this group.

In point no. 5 you have discussed the whole "Modus Operandi of giving Accommodation Entries". Here it very surprising to know that on what basis this modus operandi has been generated, as the assessee is completely unaware of this whole cycle. It will be very much important and necessary for us to know from where and from which documents and findings you have generated/set up this modus operandi.

Here, we would like to give a brief explanation on what actual Modus Operandi exist in the assessee's case.

Assessee was a commission agent (Pacca Arhatia) of rough and polished diamond in Surat making sales and purchases on behalf of some diamond traders for which assessee receive commission. Here rules and modus operandi is according to the circular no. 452 [F.No. 201/3/85-IT(A-II)], dated 17.03.1986. The circular says:

11. However, the Assessing rejected the contention of the assessee, held as follows:

(i) The Income Tax Department has conducted search & seizure action in the case of group concerns of Shri Gautam Jain and conclusively proved that these parties are engaged in the business of providing accommodation entries only, as can be clearly seen from the discussions in the above paragraphs. The parties are issuing bills without delivering any goods and services:

(ii) Evidently, the assessee had adopted a modus operandi to reduce its true profits by inflating its expenses including purchase expenses by taking accommodation entries from such parties.

(iii) Thus, in the books of accounts of the assessee, the purchase to the extent made from the above said parties remained unverifiable and hence undersigned arrived at a conclusion that the purchase shown by the assessee in the books of accounts are bogus purchases and debited to trading account to suppress the true profit to be disclosed before the department.

(iv) The onus was upon the assessee to establish the genuineness of purchases made by the assessee.

(v) Mere filling of evidences in support of purchases and payment through account payee cheque cannot be conclusive in a cause where genuineness of transaction is in doubt. Payment by account payee cheques are not sacrosanct.

(vi) If all the evidences point to the fact that no actual goods were supplied by the above any entry providers, then the argument of the assessee that it purchased goods is not tenable.

Thus, from the above analysis of the facts, it is crystal clear that the purchases made by the assessee from the above party and claimed as expenses in its profit and loss account are not genuine. In view of the above discussion and the defects pointed out, the books of accounts of the assessee were rejected u/s 145(3) of the Act.

Therefore, assessing officer noted that in assessee's case, the assessee has taken the plea that its purchases from the above parties were genuine as had made payment through account payee cheques. In this regard, it would be necessary to note that this argument of the assessee cannot be taken into consideration since in various case laws it has been held that **“mere payment by account payee cheque is not sacrosanct nor can it make a non-genuine transaction genuine [Precision Finance Pvt. Ltd. vs CIT – 208 ITR 465 (Cal.)]**. The burden of proof as to any particular fact lies on that person who wished the court to believe in its existence.

The assessing officer also noted that the ratio laid down in section 106 of the Indian Evidence Act, whereby the onus of proving the correctness of the entry, the truth of which is called in question by Assessing Officer shifts on to the assessee. If the assessee fails to discharge this onus, the AO is left free to draw his own inference from the inability of the assessee to explain what was within his knowledge and from the other circumstances of the case. Hence, it is also pertinent to mention that proceedings under the income-tax Act are not judicial proceedings in the sense in which the phrase “judicial proceedings” is ordinarily reduced. Therefore, the AO is not fetted or bound by technical rules about the evidence as contained in the Indian Evidence Act. The assessment can be made on the basis of inference on evidence which in criminal or civil justice may be insufficient. In this context, reference is invited to Hon Supreme Court's decision in the case of D. Dhormal (AIR 1974, Supreme Court 859) the Department is not required to prove its case with mathematical, a demonstrable degree for in all human affairs, absolute certainly is a myth and as proof all exactness is a fake. The absolute proof being unattainable the law accepts for its probability as a substitute in this work-a-day world the law does not require the department to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may form on the basis of existence of fact. Moreover, as per section 114 of Indian Evidence Act, the court may presume the existence of any fact which it thinks likely to have happened regarding being to

the common courts of natural events, human conduct and public and private business in their relation to the facts of the particular case.

Considering the facts and circumstances of the case discussed above, the assessing officer held that it is a clear that the assessee had obtained the bogus bills to the tune of Rs.20,48,83,051/- from M/s Krishna Diam Pvt. Ltd. respectively, without actually getting the material (diamond). Thus, the bill issued by the said group concern is nothing but accommodation entry. Hence, the accommodation entry received from M/s Karishma Diamond Pvt. Ltd., M/s Parshwanath Gems P. Ltd., M/s Mihir Diamond and M/s Krishna Pvt. Ltd. to the tune of Rs.20,48,83,051/- is treated as bogus purchases and added to the total income of the assessee.”

12. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has dismissed the technical ground raised by assessee about validity of reassessment u/s 147 of the Act, observing as follows:

“7. DISCUSSION AND DECISION OF THE APPELLATE AUTHORITY

Ground regarding validity of re-opening and assessment there-on;

7.1.1 This ground of appeal pertains to validity of re - opening of the case u/s 147 of the Act and issuance of notice u/s 148 of the I.T. Act. I have perused the submission of the AR, Remand Report and considered verbal arguments, it is seen from the records that the AO had received report from the Investigation Wing, Mumbai, which indicated that the appellant was beneficiary of accommodation entry operators. The said accommodation entry operator has admitted before the Investigation Wing that they had given bogus purchase bills to many persons including the appellant. Based on this report, the Id. assessing officer had 'reason to believe' that income was escaped the assessment. In the facts and circumstances, I am convinced that the re - opening in this case is justified. Further, in his submission and verbal arguments, the A R contested that the assessment is not made as per Law. The Id. AO has not provided the copy of statement, material, etc. which he has relied upon, to the appellant, thereby denying the appellant, an opportunity to counter the same. The AR further submitted that this is against the principle of natural justice and strikes at the validity of the assessment completed.

7.1.2 On examination of the records and as stated by the Id. AO the incriminating material papers pertaining to the suppliers were not available with the Id. AO. So there is no question of providing copy to appellant. It is also seen that opportunity to cross - examine was not provided to the appellant. It is farther seen that the Id. AO has not made any independent enquiries of his own.

He has just relied on the report of Investigation Wing, Mumbai. The Hon'ble Supreme Court in the case of Andaman Timber Mart (281 CTR 241) has categorically held that not furnishing the copy of material proposed to be relied upon, to the assessee invalidates the assessment proceedings. The Hon'ble Gujarat High Court in the case of Legal Representatives of late Laxmanbhai S Patel (327 ITR 290) also emphasizes the same ratio. Furnishing of copies of material collected by the Id. AO to the assessee is a statutory requirement as provided in Section 142(3). This requirement is emphasized by the various decisions quoted by AR in this submission (*supra*).

7.1.3 Requirement of giving materials proposed to be relied by the ld. AO to the appellant is a statutory requirement , failure to do it is fatal to the assessment as held in many judicial pronouncements such as; (Gangaram v/s CIT 5 ITR 464 - 488 - Gurmuh Singh v/s CIT 12 ITR 692 713 — International Forest v/s CIT 101 ITR 721 ITO v/s Ponkunnam 102 ITR 336 Narayan v/s CIT 20 ITR 287 ; in ITR 361; Nagulokonda v/s CIT 31 ITR 781; Thomakutty v/s CIT 34 ITR 501 Koyanmankutty v/s ITO 58 ITR 871 ; Radheylal v/s CIT 4 ITC 454 ; Gargi v/s CIT 96 ITR 97; Hirji v/s CIT 105 ITR 286 (sec 271).

However, quashing reopening and assessment on this ground would mean that the appellant is given undue benefit of mistakes by an individual officer. This is neither fair nor equitable for the revenue. Hence, this ground is not allowed.

13. On merits, Ld. CIT(A) held as follows:

“7.2 Ground regarding disallowance of bogus/ unverified purchases

7.2.1 (a) On perusal of the assessment order and submission of AR, it appears that the Ld. AO has held that assessee has made unverified purchases made from concerns belonging to one Gautam Jain Group. The Ld. AO relied on information and reports received from DIT(Inv.) Mumbai. The appellant produced before Ld. AO, the confirmation from suppliers, invoices ledger a/c, bank a/c showing cheque payments, Stock register etc. The ld. AO was not satisfied with explanations & evidences furnished by the assessee, and hence proceeded to make addition of the total impugned purchases. It is interesting to note that Ld. AO has not rebutted or discredited the material evidences furnished nor has he doubted sales made. The assessee has taken a plea before Ld. AO that he was a commission agent (Pacca Artiya) of rough and polished diamonds making sales and purchases on behalf of some diamond traders for commission. He also stated though the sales and purchases are mentioned in assessee's books only for inventory purposes but no trading a/c is drawn. On contrary Income and Expenditure account is made where in commission earned and expenses incurred are shown. The Ld. AO has not refuted this explanation furnished by assessee before him in assessment proceedings.

7.2.2(b). The AR raised before me the same explanation which he raised before Ld. AO and un specific direction filed the details of purchases and sales made to the parties concerned. The AR stated that the assessee has made purchases and sales on behalf of the above parties. He insisted that if purchases are held as bogus then same should be applied to sales too. The details furnished by AR are reproduced in para 6 above. It can be seen that almost equal quantum of sales is made by assessee to the impugned parties. It is seen from above details that the

sales made to impugned parties is higher than the alleged unverified purchased made. This shows assessee is a commission agent and not a trader indulging in purchases and sale of diamonds. I have examined the issue at length and I find that the disallowance if any has to be made out of net unverifiable purchases from the said parties. However, in this case net purchases are negative, so no purpose is served from disallowance of purchase. The AR further furnished order of my Ld. Predecessor in assessee's case for earlier year i.e. A.Y. 2007-08 CAS-1/35/2015-16 dated 12.06.2017, where in on identical facts the Ld. CIT(A) has given a finding that assessee is commission agent and restricted the addition to 0.50% being estimated commission earned on the impugned purchases.

7.2.3 The Operative part of order Ld. CIT(A) dated 12.06.2017(supra) for A.Y. 2007-08 is reproduced below;

Another bone of contention between assessee and department is relating to the true nature of business activity carried out by the assessee during the year. As per Written Submission dated 25.02.2015 filed before AO the assessee has contended that **"he was commission agent of rough & polished diamond in Surat making sales Land purchases on behalf of some diamond trades for which he was receiving commission. Though sales and purchases were recorded in books of accounts but they are for inventory purpose and no trading account is made for that. Income and expenditure account is made wherein commission income earned is credited and expenses incurred for earning commission income are debited. During the year under consideration, I did business as commission agent in proprietary concern with name and style of Sanman Exports."** Having reproduced the contention raised by the assessee, ld. AO has given her finding which is totally in contrast to the claim of the assessee. She has observed on Pg. 6 point no. 8 of assessment order as under:

"Since last many years he has been filing return of income as trader in rough and polished diamonds and has been filing return of income as trader only by mentioning the nature of business as trader in ITR Form 4."

7.4 On my direction, Ld. AR of the appellant has furnished copies of Audit Report with final accounts with Return of Income filed for earlier years/subsequent years i.e. **A.Y. 2005-06, 2006-07 & 2008-09 & 2009-10** to establish that the appellant was working as **"commission agent" not a 'trader'** wrongly alleged by the AO. Ld. AR the assessee has also referred to

CBDT Circular No.452 [F. No.201/3/85-IT(A-IIO dt 17.03.1986] mandating that Audit of Accounts u/s 44AB of the Act for the purpose of maintaining inventory. It is contended that relationship between appellant and those traders was of agent-principal. Besides this in the Part A-P&L of ITR Form 4- the assessee has shown NIL in purchases column **[PB Pg 46]**. AR has claimed that confirmation alongwith purchase - Sale bills of parties with name and address of principals & Ledger A/c copies were duly filed before AO. On my direction, AR submitted various other details including copy of ITR-4, computation of income, copy of Tax Audit Report (3CB & 3CD) Income & Expenditure A/C and Balance Sheet for AY 2007-08 in Paper Book. On verification of ITR-4 (PB Page 43) in the column of Nature of Business, the assessee has mentioned **"0301- General Commission Agent"**. Further, in 3CD report column 8(a) Nature of business has

been mentioned as "**Commission agents dealing in diamonds**" (PB Pg. 12). I have also seen that the assessee has not prepared trading A/c to reflect purchase & sale of goods but instead **Income & Expenditure A/c** has been prepared wherein only gross receipts (by way of commission) has been reflected at **Rs.6,67,276/- (PB Pg.22)**. Likewise, on **PB pg. 24** in Notes on Accounts [Part of 3CD Report], Auditor has put the following note [Sr.No2]-

"2. As explained to us assessee is commission agent but to record the movement of goods it has maintained sales and purchases register. Commission/gross receipts denotes to excess of sales overpurchases."

7.5 On the basis of above evidences & material, it is crystal clear that **appellant was not trader but worked as commission agent** (Pucca Araditya) which is evident by the fact that no purchases shown in Income & Expenditure A/C & Return filed. In fact no Trading A/c was prepared to reflect purchases & Sales and fact of his being "Commission agent" is apparent from 3CD Report ,Return of Income & Books of Accounts .The Auditor has clarified that Purchase & sales Registers were made just to record the movement of stock. The assessee has maintained daily stock tally product wise, quantity wise which is tallied without having any shortfall or discrepancy therein to indicate bogus purchases as such. Appellant has stated that goods purchased have been later sold to principals after adding up his mark up as commission ranging from 0.12% to 0.15% thus difference of sales & purchase is commission earned by the appellant which is shown as gross receipts in Audited Income & Expenditure A/c at Rs.6,67,276/- during the year. During appellate hearings, the assessee has also submitted date-wise break up of commission income which was duly found corroborated with the claim of the appellant. On the basis of above submission, it has been established beyond doubt that assessee's case is of a "**commission agent**" where only markup (profit margin)on purchases have been shown as income, therefore, question of disallowance of entire purchase amount as "bogus purchases" does not arise especially when the assessee has 'neither shown sales in P & L A/c nor claimed such purchases as expenditure. Once it is established that the appellant has not claimed any deduction for purchases exp. including **Rs.2,01,61,565/-** then this amount cannot be disallowed and added to his income. Further, the assessee has maintained quantitative tally and purchases have not been claimed as expense and sales have not been doubted by the Id.AO so the question of disallowing the alleged purchases does not arise. In view of this, I reject the finding of the Id.AO treating the entire purchases of **Rs.2,01,61,565/- from three parties namely M/s Mihir Diamonds, M/s. Krishna Diam and M/s Karishma Diamonds Pvt. Ltd** as 'bogus purchases' because findings of AO is without any positive evidence and contrary to the evidence available on record. Undoubtedly, a disallowance cannot be made if the assessee has not claimed such amount as expense in his books.

7.6 As discussed herein above, I am of considered opinion when purchase bills were produced, stock tally is shown & payments were made by account payee cheques, it is absolutely unfair to treat the entire purchases as 'bogus' when the corresponding sales have not been doubted by the Id. AO. It is settled law that there cannot be sale without having corresponding purchases. It has been held in the case of **CIT Vs. Bholanath Poly Fab (P) Ltd (2013) 355 JTR 290 (Guj)**

that when concerned parties not found at their given address, so purchases made from bogus parties but purchases themselves were not bogus as entire quantity of stock was sold by the assessee and at best only profit margin embedded in such purchases would be subjected to tax (disallowances) not the entire purchases. The appellant has also vehemently contended that assessee has maintained regular books of accounts which were subjected to Tax Audit & that too without any qualification. Payments were made by account payee cheques and entire stock was sold out which has not been doubted by the Ld. AO. I have given my thoughtful consideration to all the facts & evidences/material on record. Apparently, AO has treated the purchases from M/s. **Mihir Diamonds & M/s Krishna Diam Pvt. Ltd.** (actually it is M/s Krishna Diam (mistake in name) and M/s. **Karishma Diamonds Pvt. Ltd.** (by mistake, mentioned as Krishna Diamonds Pvt. Ltd.) as 'bogus' only for the reason of statement of Shri Gautam Jain who later on retracted his earlier statement by filing affidavit (copy filed by assessee). There have been serious allegations about "accommodation transaction" through alleged parties. The assessee did not furnish any evidence to establish that purchase price & sale price, charged (after markup) are as per market price. Besides this, ld. AR also could not do one to one mapping of impugned purchases with sales to show as to how much commission income was earned on each such alleged purchases vis-vis other purchases amounting to **Rs.2,01,61,565/-**. This puts the entire transaction under a shadow of doubts about unverifiability of purchases price and commission charged on such transactions and therefore I presume that assessee must have purchased the goods from grey/open market & bill must have been obtained from party to support the purchases and price shown in said bill was inflated in order to suppress the profit commission income. There is nothing on record to accept the possible contention of the assessee that price paid to said party was at the Arm's Length Price (ALP). The surrounding circumstances and statement of Shri Gautam Jain casts enough doubts about the genuineness of purchase transactions. On the basis of preponderance of probability, it could be said that book results are not showing true & correct picture leading to rejection of book results u/s. 145(3) of the Act (not mentioned explicitly by the AO in the order but done impliedly by the AO). However, Hon'ble Supreme Court in the case of **CIT Vs. Me. Millan & Co.** (33 ITR 182) (SC) has long back laid down that CIT(A) has power to reject the books of accounts accepted by the Assessing officer. In view of this, I invoke the provision of sec. 145(3) of the Act and proceed to estimate the commission income on the impugned purchases amounting to **Rs.2,01,61,565/-**.

7.7 The entire carats of diamonds purchased from alleged three parties have been sold during the year, so entire purchases could not be disallowed. Further, the action of the AO making disallowance of entire purchases from said parties by treating the same as bogus is not sustainable, for the simple reason that assessee was working as commission agent and impugned purchases have not been claimed as expenses, hence findings of AO are rejected. It has been proved beyond doubt that assessee has earned only commission income of **Rs.6,67,276/-** on entire business transactions by keeping mark up (profit margin) in the range of 0.12% to 0.15%. From details filed by the appellant, it is seen that on the total purchases of polished diamond made during the year of **Rs.37,14,44,534/-** and Rough Diamond of **Rs.28,59,03,595/-** and the assessee has earned commission of

Rs. 6,67,276/- which works out to approx. 0.10%. In similar type of cases, during search Rajendra Jain Group & Bhanwarlal Jain Group have admitted charging of commission @ 0.50% on such accommodation/spurious transactions. Ld. CIT(A) in the case of Shri Jitendra Kumar Jain has sustained profit @ 0.50% transactions (although deleted by ITAT on the ground that provision of Sec. 145(3) was not invoked). As discussed herein above, on such type of transactions, normal market rate of commission is 0.50% over & above what is shown in books i.e. 0.10% by the assessee. Hence, I estimate the suppressed commission income at **Rs.1,00,808/-** on the total purchases from three parties amounting to **Rs.2,01,61,565/-** which is sustained as addition. The assessee will get a relief of **Rs.2,00,60,757/- (Rs.2,01,61,565 - Rs.1,00,808)**. Ground of appeal is **partly.**”

7.2.4 Since facts are identical for the current year too and also involves same parties and since by the details of purchase and sales filed the AR has made out a case that sales made to impugned parties is higher than so alleged unverified purchases from them, the above finding of Ld. CIT(A) is applicable mutatis-mutandis to current year. Further, as already stated the Ld. AO has not given any contrary findings or rebutted this explanation of assessee furnished before him during assessment proceedings. Following the above order the suppressed commission is estimated at 0.50% of impugned purchases Rs.20,95,86,338/-, which works out to Rs.10,47,931/- for A.Y.2008-09 and 0.50% of impugned purchases Rs.1,57,66,522/- which works out to Rs.78,832/- for A.Y. 2009-10. The ground of appeal is partly allowed.

8. In the result the appeal is Partly Allowed.”

14. Aggrieved by the order of the Id. CIT(A), the Revenue is in appeal before us.

15. Learned CIT-DR and Learned Sr. DR for the Revenue, both have vehemently argued that no documentary evidences have been filed by the assessee, before the Assessing Officer, to show that assessee is a trader. As the assessee is Pucca Arahita, and such Pucca Arahita is normally treated as a trader. The Ld. DR pointed out that on page no.23 of the order of the Id. CIT(A), the Ld. CIT(A) made contradictory findings in its order, therefore assessee is a normal trader. The Ld. DR also pointed out that assessee has not demanded opportunity of cross examination, during the assessment stage, about the statement of third party therefore, assessee should not have any grievance now about opportunity of cross examination. If assessee is a Pucca Arahita, then assessee should have deducted TDS, which is absent, hence assessee is neither Pucca Arahita, nor Cachha Arahita, but he is a normal trader. Just to mention in audit report, nature

of business, as commission agent does not mean that assessee was working as commission agent. The Ld. DR also pointed out that if assessee is a pucca Arahita than assessee supposed to produce copy of agreement between the pucca Arahita and their customers, which is absent.

Besides, the assessee has not submitted the address of the purchasers and sellers. Since, the assessee is a beneficiary of Gautam Jain group cases, which is engaged in providing accommodation entries of purchases/sales, therefore 100% addition of bogus purchases should be sustained. The Ld DR stated that entry in the books of accounts cannot be a decisive factor that assessee is doing a genuine business, therefore Ld. DR for the Revenue contended that addition should be sustained at the rate of 100% of bogus purchases.

16. The Ld. DR for the Revenue submitted before us the interpretation of Circular No.452 of CBDT which is reproduced below:

“405-406. Compulsory Audit - Whether the provision is applicable TO commission agents, arahitias, etc.

1. Section 44AB, as inserted by the Finance Act, 1984, casts an obligation on every person carrying on business to get his accounts audited, if his total sales, turnover or gross receipt, as the case may be, exceed Rs.40 lakhs in any previous year relevant to the assessment year commencing on 1-4-1985 or any subsequent assessment year.

2. The Board have received representations from various person, trade associations etc., to clarify whether in cases where an agent effects Miles turnover on behalf of his principal, such sales turnover have to be treated as the sales / turnover of the agent for the purpose of section 44 Mi.

3. The matter was examined in consultation with the Ministry of Law, There are various trade practices prevalent in the country in regard to age-no business and no uniform pattern is followed by the commission agents, consignment agents, brokers, kaehha arahitias and pacca arahitias dealing in different commodities in different parts of the country. The primary necessity in each instance is to ascertain with precision what are the express terms of the particular contacts under consideration. Each transaction, therefore, requires to be examined with reference to its terms and conditions and no hard and fast rule can be laid down as to whether the agent is acting only an agent or also as a principle.

4. The Board are advised that so far as kachha arahitias is concerned, the turnover does not include the sales effected on behalf of the principals and only the gross commission has to be considered for the purpose of section 44AB. But

the position is different with regard to pacca arahtias. A pacca arahtias is not, in the proper sense of the word, an agent or even del credere agent. The relation between him and his constituent is substantially that between the two principles. On the basis of various court pronouncements, following principles of distinction can be laid down between a kaccha arahtias and a pacca arahtia:

(1) A kaccha arahtia acts only as an agent of his constituent and never acts as a principal. A pacca arahtia, on the other hand, is entitled to substitute his own goods inwards the contract made for the constituent and buy the constituent's goods on his personal account and thus he acts as regards his constituent.

(2) a kaccha arahtia brings a privity contract between his constituent and the third party so that each becomes liable to the other. The pacca arahtias, on the other hand, makes himself liable upon the contract not only to the third party but also to his constituents.

(3) Though the kaccha arahtia does not communicate the name of his constituent to the third party, he does communicate the name of the third party to the constituent. In other words, he is an agent for an unnamed principal. The pacca arahtia, on the other hand, does not inform his constituent as to the third party with whom he had entered into a contract on his behalf.

(4) The remuneration of a kaccha arahtia consists solely of commission and he is not interested in the profits and losses made by his constituent as is not the case with the pacca arahtia.

(5) the kaccha arahtia, unlike the pacca arahtia, does not have any dominion over the goods.

(6) the kaccha arahtia has no personal interest of his own when he enters into a transaction.

(7) In the event of any loss, the kaccha arahtia is entitled to be indemnified by his principal as is not the case with pacca arahtia.

The above distinction between a kaccha arahtia and pacca arahtia may also be relevant for determining the applicability of section 44AB in cases of other types of agents. In the case of agents whose position is similar to that of kaccha arahtia, the turnover is only the commission and does not include the sales on behalf of the principles. In the case of agents of the type of pacca arahtia, on the other hand, the total sales/turnover of the business should be taken into consideration for determining the applicability of the provisions of section 44AB.”

17. With help of the above circular and interpretation, Ld DR pointed out that pucca Arahtia should maintain books of accounts and it should deduct the TDS, however no TDS has been deducted by the assessee under consideration. The assessee has not demonstrated any features like a pucca Arahtia, even if the

assessee is a pucca arahita (for the sake of argument), it should be treated as a trader and benefit on account of commission agent should not be allowed, merely because there is an entry in the audit report and Form No.3CD.

18. On the other hand, Ld. Counsel for the assessee submitted that first of all the statement recorded under section 132(4) has not been provided to the assessee, hence it is violation of principle of natural justice. The ld Counsel stated that assessee is a pucca Arahita. The Ld. Counsel also stated that even if assessment order was made by the Assessing Officer under section 144 of the Act, the Assessing Officer has to refer the return of income filed by the assessee. Therefore, the best judgment assessment framed by the Assessing Officer under section 144 of the Act, in case of ITA No.87/SRT/2017 for AY.2007-08 may be quashed.

19. The Ld. Counsel, also argued that reasons recorded by the Assessing Officer are defective and bad in law, and therefore the reassessment proceedings may be quashed.

20. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the ld. CIT(A) and other material brought on record. We note that assessee has neither filed cross-objection nor filed any request under the Income Tax Appellate Rules (vide Rule 27) to argue the issue on the validity of reopening of assessment. Since the assessee has not filed the cross-appeal nor any application filed before the Tribunal under the Income Tax Appellate Tribunal Rules to argue the issue on reopening of assessment. That is, the assessee has not filed an application under Rule 27 of the Income Tax Appellate Tribunal Rules, therefore argument of the assessee on the technical issue of validity of reassessment under section 147 of the Act cannot be entertained and it is hereby rejected.

21. We Note that on merit, the assessee's case is squarely covered by the judgment of Coordinate Bench of this Tribunal in the case of Pankaj K. Chaudhary, in ITA No. 1152/AHD/2017, dated 27.09.2021. In this judgment, the Tribunal held that in case of Shri Gautam Jain, Bhanwar lal jain, Rajendra Jain and Dharmichand jain groups of cases, as they involved in providing accommodation entries of bogus purchases, therefore 6% addition on account of bogus purchases are sufficient. The findings of the Tribunal are reproduced below:

"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 Purushttom Dass Bangur [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.*

15. *On 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:*

| | |
|---|--|
| 1 | <i>M/s Andaman Timber industries Vs Commissioner of Central Excise, CIVIL APPEAL NO. 4228 OF 2006 (Supreme Court)</i> |
| 2 | <i>CIT vs. Indrajit Singh Suri [2013] 33 taxmann.com 281 (Gujarat)</i> |
| 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</i> [2017] 79 taxmann.com 153 (Gujarat) |
| 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 1 Vs. Tejua Rohit kumar Kapadia</i> [2018] 94 taxmann.com 325 (SC) |
| 11 | <i>The PCIT-17 vs. M/s Mohommad Haji Adam & Co.</i> ITA NO. 1004 OF 2016(Bombay High Court) |
| 12 | <i>Pankaj Kanwarlal Jain HUF Vs. ITO 2(3)(8) Surat ITA.No.269/SRT/2017</i> |

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 ld 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 ld 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 ld CIT(A) by considering the overall facts, concluded that the 100% disallowance of purchase is not justified. We also find that the ld.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 ld 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 adverting to the facts of the present case, the ld.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 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.

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 ld 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.

22. In the result the appeal of revenue is dismissed and the appeal of the assessee is partly allowed.”

22. Since, the issue is squarely covered by the judgment of the Co-ordinate Bench in the case of Pankaj K. Chaudhary (supra). There is no change in facts and law and Ld. DR for the Revenue did not bring any cogent evidence to distinguish the judgement of Co-ordinate Bench, therefore, respectfully following the binding judgment of Pankaj K. Chaudhary (supra), we direct the Assessing Officer to make the addition at the rate of 6% of bogus purchases / unverifiable purchases. Hence, we allow the appeal of Revenue partly.

23. We have taken the lead case in ITA No.15/SRT/2020 for AY.2007-08. Since the facts and grounds of appeal raised by the Revenue in other appeals are identical and similar, therefore our instant adjudication shall apply *mutatis mutandis* to the aforesaid other appeals of Revenue, namely, ITA Nos.87/SRT/2017 and ITA Nos. 16, 21 and 22/SRT/2020.

24. In the result, all appeals filed by the Revenue are partly allowed.

Registry is directed to place one copy of this order in all appeals folder / case file(s).

Order pronounced on 13/01/2023 by placing the result on the Notice Board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat / दिनांक/ Date: 13/01/2023

SAMANTA**

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

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

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS
ITAT, Surat