

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM**

**आयकर अपील सं./ITA No.1706/AHD/2016**

**निर्धारणवर्ष/Assessment Year: (2010-11)**

*(Physical Court Hearing)*

Bhimsen Darbarilal Arora through, L/h. Rajat Bhimsen Arora, Smt. Mamta Bhimsen Arora, A-201, Madhulika Apartment, Bhatar Road, Surat.	<b>Vs.</b>	The ACIT, Circle-5, Surat.
<b>(Appellant)</b>		<b>(Respondent)</b>
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACAPS9230L</b>		

<b>Assessee by</b>	Shri Akshay Modi, CA
<b>Respondent by</b>	Shri Ashok B. Koli, CIT(DR)
<b>Date of Hearing</b>	29/12/2022
<b>Date of Pronouncement</b>	22/02/2023

**आदेश / O R D E R**

**PER DR. A. L. SAINI, AM:**

Captioned appeal filed by the assessee, pertaining to Assessment Year (AY) 2010-11, is directed against the order passed by the Learned Commissioner of Income Tax (Appeals)-1, Surat [in short “the ld.CIT(A)”], in Appeal No. CAS-I/118/2013-14, dated 31.03.2016, which in turn arises out of an assessment order passed by the Assessing Officer, under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”), dated 20.03.2013.

2. The grounds of appeal raised by the assessee are as follows:

*“(1) On the facts and in the circumstances of the case as well in law, the CIT (Appeals)-1, Surat erred in confirming the order of the AO making addition on account of alleged unaccounted stock or goods/investments and unaccounted cash to the extent of Rs.1,20,99,549/- and Rs.4,06,485/- respectively, without considering the right and proper perspectives the explanations substantiated by the cogent, credible and authentic evidences along with the audited books of accounts placed on the records of the AO to establish the fact of non-existence of any unaccounted stock or goods and/or cash and hence, liable to be quashed.*

*(2) On the facts and in the circumstances of the case as well in law, the CIT (Appeals)-1, Surat erred in confirming the action of the AO to invoke the provisions of Section 145(3) of the Act to reject the audited books of accounts,*

*without pointing out any specific defect or discrepancy in the books of accounts and method of accounting consistently followed by the appellant and hence, liable to be struck down.*

*(3) On the facts and in the circumstances of the case as well in law, the CIT (Appeals)-1, Surat erred in confirming the addition made by the AO on account of alleged unaccounted purchases of goods to the extent of Rs. 54,26,422/- and hence, not justified.*

*(4) On the facts and in the circumstances of the case as well in law, the CIT (Appeals)-1, Surat erred in confirming the action of the AO making addition to the extent of Rs.19,46,000/- on account of alleged unexplained cash credits u/s 68 of the Act and hence, not justified.*

*(5) Both the lower authorities have grievously erred in not properly appreciating the entire correspondences made in the course of assessment proceedings/appellate proceedings, already been supplied with the appeal memo forming part of the statement of facts including cogent explanations and submissions made in writing by the appellant on various dates along with the various enclosures attached with the said submission.*

*It is therefore, respectfully submitted that taking into account various submissions written as well as oral made in the course of assessment/appeal proceedings, the entire addition be deleted in toto and the appeal of the appellant be allowed in full as prayed for.*

*(6) Your appellant further reserves her rights to add, alter, amend or modify any of the aforesaid grounds before or at the time of hearing of an appeal.”*

3. Ground no.1 raised by the assessee, relates to additions of Rs.1,20,99,549/- and Rs.4,06,485/- on account of alleged unaccounted stock of goods and cash.

4. Succinctly, the factual panorama of the case is that assessee before us is an Individual and engaged in the business of cloth. In assessee's case a survey action u/s 133A of the Income Tax Act was carried out on 18.02.2010 and the assessee had voluntarily disclosed an amount of Rs.1,25,06,034/-. The above additional income was over and above his regular income for the assessment year under consideration. During the survey proceedings the stock of cloth of Rs.1,35,17,136/- was found unaccounted in the books of assessee therefore Assessing Officer issued show cause notice dated 04.03.2013 which is reproduced hereunder for reference:

*“Please refer to your statement recorded u/s. 133A on oath and answer to question no. 14 date 18.02.2010 during survey proceedings at your business premise. During survey proceedings inventory of stock was made which was marked as S.F.1/1 dated 18.02.2010. From this inventory it is gathered that stock of cloth at your business premise was valued at the rate of Rs.16 per meter. According, to the answer to question no. 14, you were holding stock of cloth of*

11,57,699 meters @ of Rs.16/- per meter of Rs.1,85,23,187/-. As per written submission made by your authorized representative in my office on 10.12.2012, you have included details of stock of cloth at item no. (3) of 112 are details on page no.6 of covering letter. As per details which are numbered from page 1 to 335, page no. 25 to 30 covers the details of stock maintained by you from 01.04.2009 to 31.03.2010 under the head of "General Stock Register (meters)". It shows the stock of cloth in meters maintained day to day basis of opening stock, Grey cloth purchase, cloth sent to mill for processing and balance of stock of cloth on each day. More particularly on page no. 30 of stock register as referred above, the stock of cloth as on 17.02.2010 & 20.02.2010 is reflected of at 3,12,878.13 meters. During the course of survey proceedings you have disposed on oath that there, was stock of Rs.1,85,23,187/- which comes to 11,57,699 meters at the rate of Rs. 16 per .meter as acknowledged by you in inventory S.F. 1/1 signed by you on that day. In this way, your stock of cloth was 11,57,699 meters on the day of survey i.e. on 18.02.2010. Your stock of same day i.e. 17.02.2010 and 20.02.2010 shows the total stock of 3,12,878 meters only. It means you have not-shown stock of cloth which was found, inventorised & valued during the course of survey in your regular books of accounts. In this way you have under shown stock of 8,44,821 meters as below.

Stock found during course of survey	1157699 meters
Stock shown in regular books	312878 meters
Under showing of stock in books of accounts	844821 meters

The under shown stock of 8,44,821 meters at the rate of Rs.16 per meter which comes to Rs.1,35,17,136/- is the value not shown by you in your books of accounts as discussed above. From this fact, it is clear that investment made you in form of excess stock of 844821 meters not included in you books is an investment made by you from undisclosed income. The stock was valued @ Rs.16/- per meter as discussed above. Accordingly Rs.1,35,17,136/- is unexplained investment made you, which is not included in books of accounts. Moreover, same stock of cloth is not reflected after the date of survey in your books & stock register in particular. So it is believed that you have sold the same stock of cloth out of books & profit of same is not included in total income of the year. You are hereby requested to offer your explanation with supporting evidence if any, in this regard.”

5. In response to show cause notice dated 04.03.2013, explanation in respect of unaccounted stock was offered by assessee on 15.03.2013, the relevant portion of reply is reproduced hereunder:

“In para 5(iv) of your notice, solely based on the statement of the assessee recorded U/S.133A of the Act during the course of survey proceedings conducted on 18<sup>th</sup> to 19<sup>th</sup> February 2010 (more particularly Question No. 14 of the said statement), you intends to make addition of Rs.1,35,17,136/- for the alleged understated stock of goods of 844821 Mtrs. In this regard, please find enclosed herewith the Affidavit in original (duly notarized), made by the assessee retracting the statement given on 19<sup>th</sup> February, 2010, which is se If explanatory. That apart, I would like to further stated that there is no excessive stock available in the godown as well as shop of the assessee at the time of survey as

.derived by the authorized officers (as per Annex. SF.1/1) at 19,13,921 Mtrs (derived figure). In support of retraction made by the assessee in his Affidavit, the complete set of books of accounts are produced herewith for verification of the day to day purchase of raw materials and finished goods, the raw materials i.e. Grey Cloth sent to milts for printing, day to day the finished goods returned back from the mills, sales of finished goods recorded day to day and accordingly the closing stock of Grey Cloth and finished goods at the time of survey as also at the end of the financial year. In furtherance to his retraction, I am also furnishing herewith all the purchase bills, gate passes, challans as also payments made for purchases from various parties and job work charges for the value addition work of printing done by the mills. Thus, form the above record, which was available on the very day of survey, proves beyond doubt that there is no purchases made outside the books of accounts and hence, there is no case of investment in alleged unaccounted stock of goods. As a matter of fact, the Question No. 14 itself is a vague and baseless in as much as the concerned authorized officer has referred the actual stock in quantity and its quality as per books of accounts, but the amount derived by him at his sweet will has been referred kindly see Annex BF 1 (SL No. (1) to (4), from shop and SL. No. (1) to (21) from godown which clearly shows that whatever raw materials purchased by the assessee has regularly been sent to Mills for Job Work of printing has been referred. To put it differently, there is no lawful reason to rely solely upon reply to Question No. 14 which itself is vague and fishing, putting aside the replies given to the various questions more particularly Question No. 13 in which the assessee has replied that the registers for Grey Cloth sent for job work of printing to M/s. Aishwarya Dyeing and Printing, Mills Ltd. and other mills were whitened day to day, which were found at the time of survey conducted by the authorized officers of the department also. Thus, merely on the statement which has been taken under undue coercion, mental torture, threaten and harassment as explained in detail in affidavit by the assessee himself could not be the sole ground to presume that the assessee was having unaccounted stock of finished goods of 844821 Mtrs. Valued at Rs.1,35,17,136/- by you.

10.8 As a matter of fact, the whole survey proceedings conducted by the authorized officers is itself illegal without jurisdiction and bad in law for the lawful reasons stated below:

I, The illegalities committed by the authorized officers as deposed by the assessee in his affidavit as above filed with you.

II. The materials as well as books of accounts impounded (as per Annex. BF 10, BF 6 and BF 8) by the authorized officers on the very day of survey i.e. on 19th Feb., 2010, without recording any reason for impounding the materials and books of accounts. Not only that, it has been retained beyond the statutory period of 10 days without obtaining the approval of the Chief CIT, Surat This is penalty in violation of the statutory requirement as provided u/s. 133A(3)(ia) of the Act.

III. In spite of several -requests made in writing to the concerned officers for providing the copies of impounded materials and the statement recorded, it has been provided belatedly without any lawful reason. This has resulted in to unwarranted delay in finalization of accounts for the relevant year and resultantly, payment of advance tax for the year.

IV. As the sworn statement made by the assessee in his affidavit, the storage capacity of the godown and also the shop is not at all sufficient to store physically stock of the goods of the quantity derived by the authorized officers at

19,13,921 mtrs. (as per Annex. SF 1/1) so as to reach the figure of disclosure at their desired level.

V. The rate mater taken at Rs.16/- taken for all kinds of stock of goods is also baseless and more speculation of the authorized officers, moreso when there is no evidence found during the course of survey as to the sale of finished goods (ready suits) at the rate of Rs.16/- per meter nor any evidence available with the officers as to the same rate of Rs.16 per Mtr. applied for grey cloth (Taka) of 14,24,196 Mtrs. As a matter of fact, from the purchase bills and sales bills furnished herewith, you will find the true fact as to the rate per Mtr. which is very below the speculative rate of Rs.16/- per Mtrs. taken by the Authorized officers. These itself proves beyond doubt that the disclosure obtained by the authorized officers is in the garb of unaccounted investment in stock of goods and unaccounted cash. In the light of the above illegalities, I have to request you to consider in the true and right perspectives the regular books of accounts and other books records maintained by the assessee produced before you for verification. It is the well settled law position that the statement recorded u/s 133 A of the Act has no evidentiary value and admission made in such statement could not be the conclusive ground for taking any inference against the assessee.”

6. From the reply, as noted above, it was observed by Assessing Officer that assessee is stating whole survey proceedings conducted by the authorized officer is itself illegal, without jurisdiction. The main reason for illegalities committed by officers are deposed by assessee in an affidavit filed with reply received on 15.03.2013. From the affidavit it is found that this deposition was made before notary Shri Sohan M. Gandhi on 15.03.2013. An affidavit signed before notary proves only fact that this deposition was signed before notary only. This would establish that this deposition is signed by Shri Bhimsen Arora and no other person. Notary has nothing to do with the contents of affidavit. It is well accepted that same is signed by the assessee but it does not add any evidential value of its contents because same was deposed on 15.03.2013 i.e. after 3 years, one month and 7 days from the day i.e. 18.02.2010, the day of survey u/s 133A for which deposition was made by assessee. It shows that deposition was made by assessee after 822 days later from the day of survey. If at all, any deposition was to be made by assessee, it should have been immediate and submission of same before concerned officers to take cognizance of facts of such deposition. But in case of assessee this late deposition is nothing but after thought to disown the tax liability arising on account of survey action. It is very important that evidences are two types, Primary and Secondary. In cases of certain facts there are Primary

evidences itself and for which secondary evidence cannot be created. In respect of some facts when there is no primary evidence available at all, then certainly evidences by way of making affidavit can be created in form of secondary evidence. In case of assessee, survey action u/s 133A was carried out on 18.02.2010. All legal procedure were followed i.e. execution of warrant on person attending procedure, preparing inventories of book/paper, cash and stock and recording of statement in respect of fact found there. These are primary evidences which are still available on record and copies of same are given to assessee, if demanded as per law. Now these primary evidences cannot be disowned/altered or misrepresented by making an affidavit as in case of assessee. The main issue of an affidavit is that disclosure of unaccounted income was made forcefully. The contention made through an affidavit is not acceptable because in any case, person has grievance, then he will not keep silence and make such deposition after 822 days. In this situation an affidavit made after 822 days is nothing but after thought and no evidential value to take note of it. This affidavit is self-serving statement on part of assessee. While offering explanation in respect of unaccounted stock, reply dated 15.03.2013 assessee states that the assessee retracted the statement given on 19<sup>th</sup> Feb 2010 which is not found acceptable for reasons described in foregoing paras. The other contentions of having made that no purchase out of books, statement under undue coercion, mental torture, threaten and harassment have remained only allegations to brush aside tax liability.

7. The assessing officer noted that all legal procedure of impounding of books, its retention and approval of Chief CIT, Surat are well followed which the assessee has never questioned till date and can be ascertained from record with this office. In these circumstances it is not correct that space for storing stock was not sufficient and average rate of Rs.16 per meter of cloth which was accepted during the course of survey by putting signature on inventory of stock as well as statement was correct. It is not only statement u/s 133A but detailed stock inventory signed by assessee and authorized officer which clearly establishes that on the day of survey there was unaccounted stock lying at the business premise of

assessee and on being confronted on this issue in statement, same was disclosed. In view of above facts and circumstances, stock of Rs.1,35,17,136/- was found for which explanation was asked for but assessee has failed to explain to the satisfaction of Assessing Officer. In view of same, stock of Rs.1,35,17,136/- which was found has remained unaccounted in the books of assessee and added as unaccounted investment made in stock.

8. It is also important to note here that copy of general stock register was furnished with written submission dated 10.12.2012. This submission was made without taking into consideration of inventory of stock and statement recorded. For variation of value in inventory/statement and general stock register a show cause notice was issued on 04.03.2013. When assessee was asked to explain the accounted stock in question, assessee having no chance to explain, an affidavit was made and furnished with reply dated 15.03.2013. It shows that assessee has no explanation to offer on this issue and affidavit is nothing but afterthought to escape from tax liability. Based on these facts, Assessing Officer made addition of Rs.1,35,17,136/-.

9. The Assessing Officer, (having considered the submission and documents filed before him by assessee), also made addition of Rs.4,06,485/- on account of excess cash found during survey of Rs.4,06,485/-.

10. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A), who has corrected the mistake apparent/typographical error of Rs.14,17,587/-, committed by assessing officer. After having corrected the mistake, the Id CIT(A) has confirmed the action of the assessing officer. The findings of Id CIT(A) is reproduced below:

*“7.1.1 Considering the factual matrix of the case, I find that statement was made voluntarily having no traces of threat or coercion and based on discrepancies notices at the time of survey about excess stock & cash. No timely retraction was made by AO or rather no grievance against irregularity or coercion has been expressed except filing an affidavit after 822 days of survey. Above all in the affidavit the assessee has made scores of allegation without having produced any corroborative evidence to back them up, so affidavit is nothing but a self-serving document devised by assessee to avoid his legitimate tax liability. **Inventory of cash & stock prepared at the time of survey was duly confronted to the assessee at the time of survey & he only made a voluntary***

*disclosure of income, so there is no violation of Board's instruction F.No.286/2/2003-IT (Inv.II). At the time of survey, admittedly books were incomplete [Q.No.6&9] and therefore, subsequently were prepared & audited will not help the cause of the assessee. The very fact that excess stock & cash found at the time of survey has not been incorporated in the books of a/c will make these (books) unreliable & incomplete. The accuracy of stock taking & cash could have been challenged by the assessee only at the time of survey or just immediately thereafter on a very first given opportunity which was not done, therefore, after a lapse of more than 822 days, it is just not humanly possible to reexamine the stock tally to verify the allegations made by the assessee about the veracity of inventory prepared at the time of survey. Retraction of statement after a lapse of more than two years is nothing but an eye-wash and cannot save the assessee from his tax liability. Nonetheless, the AO has committed a mistake by making addition of Rs.1,35,17,136/- as against correct amount of Rs.1,20,99,549/- which is an apparent mistake deserves to be corrected. Thereby, the assessee will get a relief of Rs.14,17,587/- in this regard for obvious mistake committed by ld. AO. As far as addition towards excess cash of Rs.4,06,485/- is concerned, I do not find any infirmity in the action of the AO, hence, the addition is fully sustained. In view of this, ground no. 2 to 4 is partly allowed.”*

11. Aggrieved by the order of ld. CIT(A), the assessee is in appeal before us.
12. Shri Akshay Modi, Learned Counsel for the assessee, pleaded that Assessing Officer has made the addition based on the documents and the evidences available during the course of survey proceedings whereas ld. CIT(A) has sustained the addition holding that assessee has retracted the statement after 822 days. Therefore, ld Counsel stated that both the lower authorities sustained the addition based on different footing, hence addition should be deleted. The Ld. Counsel submitted that restriction was not made at earlier stage because in assessee's family, a relative had died and the responsible person who is going to retract the statement got disturbance and therefore delay has occurred to retract the statement.
13. Shri Modi, further stated that during survey proceedings, the statement on oath is not permissible and the statements on oath taken during the survey proceedings is not valid and for that Ld. Counsel relied on the judgment of Hon'ble Madras High Court in the case of CIT vs S. Kader Khan Sons, (2008) 300 ITR 157 (Mad. HC), wherein it was held as follows:

*“From the foregoing discussion, the following principles can be culled out:*

- (i) *An admission is an extremely important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of account do not correctly disclose the correct state of facts, vide decision of the apex court in Pulkngode Rubber Produce Co. Ltd. v. State of Kerala [1973] 91 ITR 18 ;*
- (ii) *In contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews and Sons v. CIT [2003] 263 ITR 101 (Ker.);*
- (iii) *The expression "such other materials or Information as are available with the Assessing Officer" contained in section 158BB of the Income-tax Act, 1961, would include the materials gathered during the survey operation under section 133A, vide CIT v. G. K. Senniappan [2006] 284 ITR 220 (Mad.);*
- (iv) *The material or information found in the course of survey proceeding could not be a basis for making any addition in the block assessment, vide decision of this court in T. C (A) No. 2620 of 2006 (between CIT v. S. Ajit Kumar [2008] 300ITR 152 (Mad.);*
- (v) *Finally, the word "may" used in section 133A(3)(iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act", as already extracted above, makes it clear that the materials collected and the statement recorded during the survey under section 133A are not conclusive piece of evidence by itself.*

*For all these reasons, particularly, when the Commissioner and the Tribunal followed the circular of the Central Board of Direct Taxes dated March 10, 2003, extracted above, for arriving at the conclusion that the materials collected and the statement, obtained under section 133A would not automatically bind upon the assesses we do not see any reason to interfere with the order of the Tribunal.*

*Accordingly, no substantial question of law arises for consideration, the tax case appeal stands dismissed."*

14. Therefore, Ld. Counsel contended that section 133A does not empower any Income Tax Officer to examine any person on oath during survey, hence addition should be deleted.

15. On merits, Ld. Counsel submitted that survey was conducted on 18.02.2010 and on the date of survey, the books of accounts were not completed, therefore, statement given by the assessee was just an estimate basis and accuracy of the stock was not ascertained on the date of the survey. However, during the assessment proceedings, the assessee has submitted complete audited books of accounts before the Assessing Officer. Despite of this, the Assessing Officer rejected the books of accounts of the assessee without pointing out any defects. The Ld. Counsel submitted that as per audited books of accounts, there is no difference in the stock, therefore the Assessing Officer cannot make addition.

16. About excess cash of Rs.4,06,485/- found during the course of survey, the Ld. Counsel submitted that, first of all, it was not a shortage in cash in hand, rather it is an excess cash found on the date of survey, therefore on account of excess cash, there should not be any addition. The Ld. Counsel also stated that cash book was not prepared up to the date of survey, therefore it was an excess cash. The Ld. Counsel also stated that audited books of accounts were produced before the Assessing Officer during the assessment proceedings and the Assessing Officer did not find any mistake so far excess cash of Rs.4,06,485/- is concerned, therefore there should not be addition on account of excess cash. Besides, Ld. Counsel also submitted that in so far excess cash of Rs.4,06,485/- is concerned, the department does not have power to take statement on oath.

17. On the other hand, Learned Departmental Representative (Ld. DR) for the Revenue submitted that Assessing Officer can take a statement during the survey proceedings; however there is a bar to take statement on oath. That is, to take **statement** is permitted, but **statement on oath** is not permitted. However, just to administrate the oath at the time of taking the statement does not vitiate the contents of the statement. No doubt, there is no provision in section 133A of the Act to take a statement on oath, however there is a provision to take statement and just because oath has administrated does not mean that contents of the statement vitiated on account of oath administrated by the assessee. The Ld. DR also pointed out that if the assessee wants to challenge the statement on oath which is not permissible during the survey proceedings, then how and why he has

retracted the statement after 822 days. If the assessee wants to maintain the plea that statement on oath is not permitted during the survey then there was no need to retract the said statement. That is, the statement on oath, should not have been retracted. Thus, retraction of statement means, the assessee has accepted the statement taken during survey. Therefore, the assessee should not maintain two stands. Hence, Id DR stated that if the statement on oath is not permitted during the survey proceedings, then what was the need to retract such statements, hence the assessee cannot take two stands simultaneously. The Id DR thus pointed out that in case of judgment of Hon'ble Madras High Court in the case of CIT vs S. Kader Khan Sons,(supra), the statement was not retracted, hence assessee's case is distinguishable on this fact and therefore, assessee cannot take the shelter of judgment of Hon'ble Madras High Court in the case of CIT vs S. Kader Khan Sons,(supra).

18. The Ld. DR submitted that the accuracy of the stock taking and cash in hand, could have been challenged by the assessee only at the time of survey or just immediately thereafter, which was not done, therefore after a lapse of more than 822 days, it is not possible to re-examine the stock by Assessing Officer to verify the allegations made by the assessee about the veracity of inventory prepared at the time of survey. Therefore, Ld. DR pointed out that retraction of statement after the lapse of more than 2 years is nothing but an eye wash.

19. The Ld. DR also submitted that addition was not solely made based on the statement rather it has been made based on the evidence and documents collected during the survey proceedings. The Id. DR pointed out that Assessing Officer has expressly stated that additions were made based on the documents and evidences obtained by the department during the survey proceedings and not based on the statement alone. The Id DR did not agree with the argument advanced by Id Counsel to the effect that assessing officer made addition based on documents and evidences whereas Id CIT(A) sustained addition based on retraction of the statement. The Id DR pointed out that both the lower authorities made/sustained addition based on documents and evidences and based on retraction of statement.

Both the authorities, in their respective orders, have discussed the issue based on documents and evidences and based on retraction of statement. Thus, Ld. DR pointed out that issue of retraction of statement was there before the Assessing Officer and as well as before Id CIT(A), hence Ld. CIT(A) has not taken different stand. The Ld. DR pointed out that Ld. CIT(A) has also discussed the documents and evidences, in his order, which is evident with para para 7.1.1, the Id. CIT(A), wherein he held as follows:

*“...Inventory of cash & stock prepared at the time of survey was duly confronted to the assessee at the time of survey & he only made a voluntary disclosure of income, so there is no violation of Board’s instruction F. No. 286/2/2003-IT(Inv.II). At the time of survey, admittedly books were incomplete [Q.No.6&9] and therefore, subsequently books of a/cs were prepared & audited will not help the cause of the assessee.....”*

20. Therefore, Ld. DR pointed out that Id. CIT(A) has not adjudicated the issue merely based on the retracted statement but based on the documents and evidences found during the survey proceedings which were confronted to the assessee. Hence, the Id. CIT(A) has not taken a different stand. The stand taken by the Assessing Officer and the Id. CIT(A) are similar and there were no differences in views of both the lower authorities.

21. The Ld. DR also pointed out that at the time of survey the stock-statements were prepared and confronted with the assessee and assessee has admitted, therefore it is not an addition made by AO based on statement rather the addition is based on documents and evidences. If the books of accounts were incomplete and the figures of the stocks and cash in hand, which were confronted to the assessee, were wrong, then assessee would have immediately approached the survey authority to correct it, but the assessee has failed to do so. Therefore, Ld. DR for the Revenue prayed the Bench that the addition sustained by the Id. CIT(A) should be upheld.

22. 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 Id. CIT(A) and other material brought on record. We find merit in the

submission of Id DR for the Revenue, as he pointed out that just to administrate the oath at the time of taking the statement does not vitiate the contents of the statement and documents/evidences found in survey. The addition was made based on documents and evidences. The Id DR stated that if the statement on oath is not permitted during the survey proceedings, then what was the need to retract such statements, hence the assessee cannot take two stands simultaneously. The Id DR thus pointed out that in case of judgment of Hon'ble Madras High Court in the case of CIT vs S. Kader Khan Sons,(supra), the statement was not retracted, hence assessee's case is distinguishable on this fact and therefore, assessee cannot take the shelter of judgment of Hon'ble Madras High Court in the case of CIT vs S. Kader Khan Sons,(supra). We note that after a lapse of more than 822 days, the assessee has retracted the statement therefore such retraction of statement after the lapse of more than 2 years is nothing but an eye wash. Hence we do not agree with the argument of Id Counsel to the effect that 'restriction was not made at earlier stage because in assessee's family, a relative had died and the responsible person who is going to retracted the statement got disturbance and therefore delay has occurred to retract the statement'. Hence, we are of the view that such 'restriction is invalid.

23. We note that Hon'ble Supreme Court in the case of Dr. Partap Singh v. Director of Enforcement 155 ITR 166(SC) held that illegality of the search does not vitiate the evidence collected during such illegal search. The Hon'ble Supreme Court in the case of Pooran Mal v. Director of Inspection (Inv.) 93 ITR 505 (SC) held that even though the search and seizure were in contravention of provision of section 132, material seized would liable to be used against person from whose custody it was seized. Hence, the documents found in survey can be used against assessee even if statement on oath is retracted by the assessee. In assessee's case the addition was made by AO based on the documents and evidences collected during survey. We also note that such admission on oath can be retracted by the assessee only if the circumstances such as threat, coercion, undue pressure etc. is established by the assessee. But in the instant case no such

evidence could be produced. Similar view has been expressed by in the case of Hotel Kiran 82 ITD 453(Pune).

24. We note that addition was not solely made based on the statement rather it has made based on the evidence and documents collected during the survey proceedings. The Assessing Officer has stated in assessment order that additions were made based on the documents and evidences obtained by the department during the survey proceedings and not based on the statement. The Id CIT(A) has also discussed the documents and evidences obtained by the department during the survey. Hence, addition is not based solely on the statement.

25. However, we note that at the time of survey the books of accounts were not completed. At the time of assessment proceedings, the assessee has submitted audited books of accounts. The Ld. Counsel submitted that survey was conducted on 18.02.2010 and on the date of survey, the books of accounts were not completed, therefore, statement given by the assessee was just an estimate basis and accuracy of the stock and cash on hand were not ascertained on the date of the survey. Therefore, we note that assessee has not submitted the reconciliation statement for stock and cash in hand between audited books of accounts and unaudited books of accounts at survey. The assessing officer has also not asked the assessee to submit reconciliation statement, showing differences and items of differences, between audited books of accounts and unaudited books of accounts at survey, about stock and cash in hand. Therefore, we are of the view that one more opportunity should be given to the assessee to explain the differences in stock and cash in hand, hence this issue may be remitted back to the file of the assessing officer for limited purpose to examine the reconciliation statement. The plea taken by Id Counsel about retraction of statement has been rejected by us in above para of this order, thus issue is being remitted back to the file of the assessing officer only for limited purpose to examine the reconciliation statement. Therefore, we deem it fit and proper to set aside the order of the Id. CIT(A) and remit the matter back to the file of the Id. CIT(A) to examine the reconciliation statement and adjudicate the issue afresh on merits in accordance with law. The assessee is directed to submit before the assessing officer, the reconciliation

statement, showing differences and items of differences, between audited books of accounts and unaudited books of accounts at survey, about stock and cash in hand. For statistical purposes, the ground no.1 of the assessee is treated as allowed.

26. In the result, ground no.1 raised by the assessee is allowed for statistical purposes.

27. Ground No.2 raised by the assessee relates to rejection of books of accounts under section 145(3) of the Act.

28. We have heard both the parties. The Ld. Counsel for the assessee submitted that books of accounts of the assessee were audited and the Assessing Officer without pointing out any mistake in the audited books of accounts rejected the books of accounts under section 145(3) of the Act which is not tenable in the eye of law. On the other hand, Ld. DR for the Revenue submitted that during the course of survey unaccounted stock and cash were deducted by the survey team which remained to be explained and incorporated in the books of accounts. Besides, there were unverified purchases in the case of the assessee which were not recorded in the books of accounts and therefore the Assessing Officer came to the conclusion that book result are incomplete and incapable to show true and correct income of the relevant year and therefore the Assessing Officer was fully justified in rejecting books of accounts by invoking provision of section 145(3) of the Act.

We have considered submissions of both the parties and note that this was categorically admitted during the recording of statement during survey that day to day stock was not maintained [QN-9] and books were written only upto December 2009 [QN.8] whereas survey was conducted on 18/19 Feb,2010. Most importantly, survey led to detecting unaccounted stock and cash to the disclosure of unaccounted income to the tune of Rs.1,25,06,034/- which has not been incorporated in the books of accounts prepared/completed subsequently. This is more than enough and valid reason to reject the books of accounts. Besides this,

the AO has detected huge amount of unverifiable purchases i.e. Rs.4,36,12,234/- because parties were not found traceable at given addresses. It has been held in the case of CIT V/s H. Dasappa & sons (Kar.) 49 DTR 119 that discrepancy in stock during search and retraction of sworn statement after 6 months without any material, defects in stock taking should have been mentioned at the time of taking of stock, rejection of book results justified. Nevertheless, Hon'ble ITAT Mumbai has held in the case of DCIT v/s Sameer Diamonds Exports Ltd (71 ITD 75) that this is for AO to determine whether the books of accounts are correct and complete according to his satisfaction or not. In view of the above discussion and inter alia facts of the case that during survey unaccounted stock and cash to the tune of Rs.1,25,06,034/- was detected by the survey team which remained to be explained and incorporated in the books coupled with unverifiable purchase renders the books of account incomplete and incapable to show true and correct picture of the relevant year, and hence, the AO was fully justified in rejecting the book of accounts by invoking the provision of section 145(3) of the Act. Hence, we uphold the above findings of Id CIT(A) and ground no.2 of appeal of the assessee is dismissed.

29. In the result, ground no.2 raised by assessee is dismissed.

30. Ground No.3 raised by the assessee related to addition made by the Assessing Officer on account of alleged unaccounted purchase of goods of Rs.54,26,422/-.

31. Brief facts *qua* the issue are that for verification of purchases of grey cloth i.e. raw material of business, notices u/s 133(6) of the I.T. Act, 1961 were issued. Out of these, in 36 cases notices returned unserved by postal authorities and in 50 cases the notices u/s 133(6) were served but there was no confirmation from each party. In view of these, assessee was asked to explain the same vide AO notice dated 04.03.2013. In response to show cause notice for unexplained amount of expenses of purchases, the submission dated 16.03.2013 furnished copies of ledgers of parties from whom purchases are made. These details are from page no. 26 to 71 of submission. It is pertinent to note that there is no copy of bank

statement provided by the assessee in which name of party who sold the grey cloth and accepted payment through cross account payee cheque or draft is reflected in it. From the copy of ledger from the books of assessee no conclusion can be drawn for satisfying the genuineness of transactions. The copies of ledgers are signed by assessee only and not by the party who sold grey cloth to assessee. As required under section 40A(3) of the I.T. Act, all the payment to these parties are required to be made through cross account payee cheques or drafts only as each payment exceeds Rs.20,000/-. In absence of bank account of assessee and name of such parties in same bank statement would only concluding and final proof for compliance of Section 40A(3) of the Act. As stated by assessee, "the copies of purchase bills (which are not produced as discussed in earlier para) and ledger accounts, simultaneously establish that the raw-materials has been purchased by making payments by A/c payee cheques". The contention is not correct because bills are not produced and copy of bank statement reflecting names of such parties having received payment through cross a/c payee cheque is not submitted at all. In view of these, contention of assessee is unsupported. Grey cloth sent for process, day to day stock register prepared by assessee would not establish purchases genuine *suo motu*. In this way the assessee failed to prove the purchase required to be genuine. Total purchases of Rs.5,12,93,518/- was asked to be proved as genuine in show cause notice. After issue of said show cause notice, Assessing Officer has received 10 confirmations involving the purchases of Rs.47,98,574/- which are considered genuine due to confirmation received from the date of issue of show cause notice till date of order. With written submission received on 18.03.2013, 20 confirmations are received signed by the seller of grey cloth, it is noticed that in 10 cases, addition on account of unverifiable purchases were not proposed at all. In case of M/s. Krishna Enterprise and Arvi Enterprise from whom purchases are made worth Rs.2,00,854/- and Rs.4,71,562/- confirmations in response to notice u/s. 133(6) are received by Assessing Officer on 27.02.2013 directly hence is not be added out of total purchases. In rest of eight cases as below confirmations filled by assessee with submission dated 18.03.2013 are considered and amount is deducted from the total disallowance of unverifiable purchases.

Sr. No.	Name of the Party	Amount of purchases involved
1.	Shree Enterprise	Rs. 1,91,115/-
2.	Vee Gee Textiles	Rs. 3,14,015/-
3.	Shree Sankheswer Syndicate	Rs. 3,81,240/-
4.	Jay Veer Textiles	Rs. 3,84,948/-
5.	Pramukh Enterprise	Rs. 5,27,686/-
6.	Jay Veer Fabrics	Rs. 5,70, 588/-
7.	Ambica Fabrics	Rs. 2,57, 397/-
8.	Jay Fabrics	Rs. 2,55,720/-
	<b>Total</b>	<b>Rs.28,82,709/-</b>

(i) Amount of purchases proposed to be disallowed vide show cause notice dated 04.03.2013 Rs.5,12,93,518/-

(ii) Considered as 10 confirmations received from party of Purchases from the date of issue of show cause till date of order. Rs.47,98,575/-

(iii) Considered on account of written submission made on 18.03.2013 Rs.28,82,709/-

Therefore, assessing officer made net disallowance at Rs.4,36,12,234/-  
(Rs.5,12,93,518 - Rs.47,98,575- Rs.28,82,709 )

32. On appeal, the ld. CIT(A) has corrected apparent mistake (*bona fide* error committed by AO) and then restricted the disallowance to 12.5% of purchases of Rs.4,34,11,380/- and accordingly, the addition was sustained by Rs.54,26,422/- (i.e. 12.5% of Rs.4,34,11,380/-), by observing as follows:

**“Discussion and appellate decision:**

10.1 At the outset, I would like to point out an apparent error committed by the AO while computing the amount of disallowance at Rs.4,36,12,234/- on page 14 of the assessment order. On the top of this page, the AO has held that in the case of M/s. Krishna Enterprise & M/s. Avi Enterprise from whom purchases worth Rs.2,00,854/- & Rs.4,71,562/- respectively were made & confirmations in response to notice u/s. 133(6) were received on 27.02.2013, hence the same were not to be added. However, on verification of list of 56 doubtful parties (given as per Annex- X), the name of M/s Krishna Enterprise is appearing at Sr. No.11, showing exact amount of Rs.2,00,854/- which is obviously part of total amount of purchase disallowed i.e. Rs.4,36,12,234/-. On prima facie observation, it seems that AO has committed a bonafide error through oversight. Therefore, I order to delete this amount (added due to oversight) subject to final factual verification to be done by the present AO while giving the appeal effect. Subject to these remarks addition of Rs.2,00,854/- is hereby **deleted**.

10.2 Further, the other contentions of the assessee have been verified in the light of evidences filed & remand report submitted by the ld. AO. It is true that books

of accounts are regularly subjected to Audit but fact remains that during the course of survey, the assessee admitted about incompleteness of cash book (Q.6) & incompleteness of other books which were written only upto Dec. 2009 [Q.5]. Further in reply to Q.9, the assessee had admitted that day-to-day stock were not maintained. It is also evident from Inventory of Books found [BF/1] that assessee was having "4 Grey Challan Book to Mill" at Sr. No.1 to 4 and all were incomplete i.e. pertaining to period 01.01.2010 to 01.01.2010, 01.01.2010 to 02.01.2010, 02.01.2010 to 01.02.2010 & 02.10.2009 to 07.10.2009 respectively. Hence, it leads to a natural inference that records/books were not written in a regular manner. The very fact that excess unexplained stock & cash worth **Rs.1,25,06,034/-** was found and disclosed as unaccounted income proves beyond doubt that books of a/cs were incomplete, and not showing true/correct affairs of the business & therefore and as already upheld by me the action of the AO in rejecting the book results by invoking the provision of Sec. 145(3) of the Act was fully justified.

10.3 Before me, Id. AR has claimed that the assessee not only produced/ furnished purchase Bills, Ledger A/c copies, delivery challans, Name & Address of parties with PAN & confirmation but also filed copies of cheques (before me as addl. evidence) to prove that payments were made by A/c payee cheque. On **being enquired** by AO in remand proceedings from concerned Bank about the name of party, Bank A/c No., Name & Branch of Bank in whose a/c these cheques ultimately got deposited, State Bank of Patiala informed the names of party, Name of Bank & Branch without A/c No. The AO has enclosed the copy of Bank's reply with Remand Report wherein he has mentioned that Bank has not confirmed the payment details about 5 parties aggregating payments of **Rs.9,22,624/-**. Thus claim of the appellant is not entirely true. On the other hand, since the AO issued notices u/s,133(6) of the Act, he has all the more reason to doubt the genuineness of purchases because notice u/s.133(6) either returned unserved or remained uncompleted. During remand proceedings lapse, the present AO asked the assessee to provide 'current addresses of the purchase parties which was declined by the AR of the assessee. The AR has cited decision of Delhi High Court in **M N Securities Pvt. Ltd.** (supra) to stress upon-that non-compliance to notice u/s.133f 6J/131 is not a lawful ground to make disallowance. Although proposition is somewhat more of a technical nature rather than based on facts of the case. It is somewhat unusual that even though assessee was having regular business transactions with these parties, he was unable to provide the correct address. For an instance one of the a/c of purchase party **M/s. S.P. Corporation**, the assessee had total purchase transaction of **Rs.62,10,242/-** but unable to provide current address of the party who failed to respond to notice issued u/s. 133(6) of the Act. Not providing details about "current address" of impugned parties would mean that assessee not sharing the facts which are within his personal knowledge. The law of evidence mandates that if the best evidence is not placed before the court, adverse inference has to be drawn against the person who has to produce it,

10.4 Hon'ble Rajasthan High Court in the case of **Indian Woolen Carpet Factory Vs. ITAT 178 CTR 4420 (Raj)** has held that onus was upon the assessee to prove genuineness of purchases. The contention of the assessee that in case of return of notices u/s.133(6), the AO should have issued summons u/s.131 and return of notice by itself should not lead to adverse inference against the

assessee. I do not agree with this proposition. On this aspect, Hon'ble Bombay High Court in the case of **Ram Kumar Jalan Vs. CIT (1976) 105 ITR 331 (Bom.)** has held that where summons was returned with postal remarks 'not known' (and not found) the said endorsement presupposed that at the given address furnished by the assessee the addressee could not be traced. The question of issuing a second summons would arise only if the address given earlier was erroneous, and not when it was almost identical. In the present case, even though asked by AO in remand proceedings, the assessee expressed his inability to provide current address due to death of the assessee and legal heir is not in contact with these parties. The fact remains that the AO could not complete his verification about the genuineness of purchases. In respect of payments by account payee cheques, the necessary information except 5 parties to whom Rs.9,22,624/- was paid have been filed by the assessee. From verification of material available on record, copies of confirmation were not found. Merely because purchase Bills, invoices. Purchase Register have been produced before AO (which he has denied), the ingenuine purchase cannot ipso facto becomes genuine. Ld.AR has also misdirected himself while alleging that AO wrongly applied provision of 69C. In fact AO has nowhere referred about this section and in fact made disallowance out of purchases treating them unverifiable. Finding of excess stock & cash by itself is good ground for rejection of books of a/c especially when such excess stock & cash has not been incorporated in the books. Hence, the action of the AO u/s. 145(3) of the Act was rightly held justified in earlier paras. The books of accounts found at the time of survey were incomplete these books have been prepared subsequently; therefore, not finding any discrepancy has a very little significance. It was held in the case of **ACIT Vs. Shrikrishan Malpani 32 Taxworld 122 (JPR)** holding that alleged bogus purchase is defect in maintenance of books of a/cs and therefore, the books of a/cs rightly rejected. Further in the case of **Gem Paradise Case ITA/700/JP/2009 dated 18.12.2009** holding that even after providing Sale Tax No., PAN & payment through account payee cheque since assessee was not able to prove genuineness of the purchases which were found to be non-existent at the given address, rejection of accounts is justified and correct profit cannot be deduced from such unverifiable books of accounts.

**10.5** It is, however, noticed that AO did not point out any discrepancy about the sales of finished goods (after value addition of Grey Cloth) and did not disbelieve the sales figures. It is settled legal position that there cannot be any sales without having corresponding purchases. It has been held in the case of **Sun Steel Ltd. 92 TTJ 1126** that there cannot be sales without purchases, at the most purchases from other parties - only margin of profit added. In view of the facts & circumstances involved in this case, I considered view that instead of making 100% disallowance of 'unverifiable purchase', the AO should have restricted the disallowance on some percentage basis. The AO had considered these purchases as bogus purchases and had disallowed 100% of such purchases. Considering the factual matrix of the case, I am of the considered view that these purchases could at worst be treated as unverifiable purchases, not a bogus purchase. This is settled position of law that onus of proving expenditure is on the assessee. The AO ought to have treated the entire purchases as unverifiable not as bogus because the whole exercise seems to have aimed to inflate the purchases. I find the decision of the AO for addition is acceptable in principle but found that disallowance @ 100% is not fair,

reasonable and justified. It is for the simple reason that when the sales/stock have not been questioned' by the AO then there is no justification to disallow the entire purchases to the extent of 100 % of such amount. **It is but obvious, there cannot be any sales without having corresponding purchases. The Hon'ble ITAT, Ahmedabad in subsequent decisions has restricted the disallowance to 12.5% instead of 2.5% as adopted in the case of Vijay Proteins Ltd. 55 TTJ 76.** Some of the cases are asunder:-

- (i) **M/s. Bholanath Poly Fab P. Ltd. Vs. ITO in ITA No. 137/Ahd/2009**
- (ii) **M/s. Raj Exports Vs. ACIT, in ITA No. 1827/Ahd/2005**
- (iii) **M/s. Sanket Steel Traders Vs. ITO, in ITA No. 2801/And/2008**
- (iv) **Smt Sajjandevi B. Jain Vs. ITO, OSD-1, in ITA No. 609/And/2009**
- (v) **ACIT Vs. Kulubi Steel, in ITA No. 1568/And/2008**

**10.6** In the case of **Vijay Proteins Ltd.** (supra) a large number of adverse facts were brought on record, namely, that blank bill books and signed cheque books of a number of persons were found and seized from the assessee. Besides this, in that case payments were made by cross cheques and not by account payee cheques and it was established that cheques were encashed by party itself and accordingly money had come back to the assessee. No such extreme adverse facts are present in the case under It was held that in such circumstances, onus to prove purchases was on the assessee, which could be discharged 'strong, cogent and clinching evidence in view of denial by all the parties and-coupled with other circumstantial evidences. Yet, it was held that the whole amount could not be treated as undisclosed income as the material had been received by the assessee and used in its business. Therefore, the addition was restricted to 25% of the purchase price as it was held that the whole exercise was done with a view to inflate the expenditure. Such was the situation in the decision delivered in the case of **Vijay Proteins (supra)**.

**10.7** However, in this case, I find that the book results of the assessee for this year are almost in line with the book results of the earlier years. However, there is no corroborative evidence to support that the bills from impugned parties were as per market value and purchase cost represent fair market value. These facts do lead to a reasonable inference that the whole arrangement was with an intent to inflate purchase price. Looking to the fact that no direct evidence could be produced by the assessee to support the reasonableness of purchase price shown in the bills, therefore, the purchase price cannot be taken on face value. The firm was engaged in regular business of cloth trading and books were subjected to scrutiny twice u/s 143(3) of the Act in the past. The Books of accounts maintained were also subjected to Audit u/s.44AB wherein no adverse remarks given by the Auditors. In fact Id. AO also rested all his conclusions on non-service & non-reply to notices u/s 133(6) of the Act issued to purchase parties. As a matter of fact, there is no direct evidence in the form of statement/admission of purchase parties to hold that purchases made from them were bogus. This lead to only one conclusion that enquiry remains inconclusive but at the same time everything is not in order with regard to these impugned purchases.

**10.8** Besides this, my predecessors and other CIT(A), Surat have also confirmed disallowance @ 12.5% of unverifiable purchases in the following cases having involved almost similar facts and circumstances:-

Name of the assessee	A.Y.	Appeal No.	Date of Order
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(a) M/s. Thakorji Textile Pvt. Ltd.	2003-04	CAS-II/60/TRFD/11-12	14.02.2013
(b) M/s. Suryaprakash Silk Mills Pvt. Ltd.	2003-04	CAS-II/59/TRFD/11-12	14.02.2013
(c) M/s. Suryanarayan Silk Mills Pvt. Ltd.	2003-04	CAS-II/58/TRFD/11-12	14.02.2013
(d) M/s. Rameshchandra I. Gandhi	2003-04	CAS-II/TFR/126/13-14	24.02.2014
(e) M/s. Sundry Exports Ltd.	2003-04	CAS-II/49/TFRD/12-13	24.12.2012

**10.9** It is pertinent to refer to the decisions of jurisdictional High Court in the case of **GIT Vs. Sathyanarayan P. Rathi (Guj) 351 ITR 150 & CIT Vs. Bholanath Poly Fab Pvt. Ltd. (2013) 355 ITR 290 (Guj)** wherein it was held that based on facts on record, the Hon'ble ITAT came to right conclusion that the assessee did purchases goods & sold them, therefore, as a natural corollary, not the entire amount covered under such purchases but the profit element embedded therein would be subjected to tax. It was held that parties had not supplied the goods as named by the assessee but were purchased from open market. The Hon'ble High Court upheld the disallowance sustained by **Hon'ble ITAT @ 12.5%** out of such purchase amount observing that there was no reason to interfere in the order of ITAT. Hence, the finding of the Hon'ble ITAT has been finally upheld by Hon'ble High Court of Gujarat.

On perusal of these case laws, I have noticed that the facts of the present case are somewhat similar if not identical because the appellant has maintained the quantitative tally and goods were sold by earning profit thereon so the disallowance @ 12.5% seems quite reasonable and justified to me. As discussed in para 10.1 of this order, the AO committed an error of not allowing relief against purchase of Rs.2,00,854/- from M/s. Krishna Enterprise which he held as genuine in the order. Thus, assessee is allowed relief on this count and decision is restricted to balance addition of Rs.4,34,11,380/- of this case are slightly better than of Vijay Proteins (supra) and g the decisions of Hon'ble Gujarat High Court (discussed supra), it will be fair and reasonable to restrict the disallowance to 12.5% of the purchase price mentioned in the bills instead of 100% disallowed by the ld. AO. Respectfully following the decision of Hon'ble jurisdictional High Court, I, therefore, hold that the disallowance is required to be restricted to 12.5% Rs.4,34,11,380/- and accordingly, the addition is sustained by Rs.54,26,422/- i.e. 12.5% of Rs.4,34,11,380/- and balance of addition of Rs.3,79,84,958/- is hereby deleted. Hence, the ground of appeal is partly allowed.”

33. Aggrieved by the order of ld CIT(A), the assessee is in appeal before us. The Ld. Counsel submitted that assessee has submitted PAN Number, address of each parties. In order to know the genuineness and identity of these parties, the Assessing Officer should have issued the notice under section 133(6) of the Act, since the Assessing Officer has failed to issue the notice under section 133(6) of the Act to these parties, therefore, there is no mistake on the part of the assessee as the assessee has discharged his onus by submitting PAN No., address of the parties and their bank statements. The Ld. Counsel also stated that when the sales of the assessee were accepted by AO then all purchases of the assessee were

going to be genuine, therefore entire addition sustained by the Id. CIT(A) should be deleted.

34. On the other hand, Ld. DR for the Revenue submitted that just because transactions are through banking channels does not mean that transactions are going to be genuine. It was the responsibility of the assessee to produce these parties, before the Assessing Officer to establish the genuineness of the purchases. None of the parties was produced by the assessee before the Assessing Officer, therefore genuineness of the transactions are not proved. The Id. DR also stated that Ld. CIT(A) has confirmed the addition at the rate of 12.5% which is quite reasonable in the case of bogus purchases, therefore order of the Id. CIT(A) should be upheld.

35. We have heard both the parties. We note that Co-ordinate Bench of ITAT, Surat in the case of Pankaj K. Chaudhary, in ITA No.1152/AHD/2017, dated 27.10.2021 has sustained the addition on bogus purchase/unverified purchases at the rate of 6% of the bogus purchases. The finding of the Co-ordinate Bench is reproduced below:

*“12. We have heard the submission of Id.CIT-DR for the Revenue and the Id. Authorised Representative (AR) of the assessee. We have also gone through the various documentary evidences furnished by assessee. The Id. CIT-DR for the Revenue supported the order of AO. The Id. 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 Id. CIT(A) restricted the addition to the extent of 12.5% which is on the lower side. The Id. 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 Id.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 &amp;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 &amp; Ors. WRIT PETITION NO. 3540 OF 2018 (Bombay High Court)</i>
6	<i>CIT in Vs. Mohmed Juned Dadani 355 ITR 172 (Gujarat)</i>
7	<i>Micro Inks Pvt. Ltd. Vs. ACIT [2017] 79 taxmann.com 153 (Gujarat)</i>
8	<i>Shakti Karnawat Vs. ITO - 2(3)(8), Surat ITA 1504/Ahd/2017 and 1381 /Ahd/2017</i>
9	<i>Asian Paints Ltd. Vs. DCIT, [2008] 296 ITR 90 (Bombay)</i>
10	<i>PCIT, Surat 1 Vs. Tejua Rohit kumar Kapadia [2018] 94 taxmann.com 325 (SC)</i>
11	<i>The PCIT-17 vs. M/s Mohommad Haji Adam &amp; Co. ITA NO. 1004 OF 2016 (Bombay High Court)</i>
12	<i>Pankaj Kanwarlal Jain HUF Vs. ITO 2(3)(8) Surat ITA.No.269/SRT/2017</i>

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.”

36. Therefore, respectfully following the binding precedent of Co-ordinate Bench (supra), we are of the view that addition should be sustained at the rate of 6% of bogus purchases instead of 12.5% of the bogus purchases. Therefore, we direct the Assessing Officer to sustain addition @ 6% of bogus purchases.

37. In the result, ground no.3 raised by assessee is partly allowed.

38. Ground No.4 raised by the assessee relates to addition to Rs.19,46,000/-, on account of unexplained cash credit under section 68 of the Act.

39. The Ld. Counsel for the assessee, at the time of hearing submitted that all loans were repaid in the subsequent years. However, the Ld. Counsel did not produce the Bank statement before the Bench to verify the fact that loans were repaid in the subsequent years. However, Ld Counsel also stated that it is difficult to submit the bank statement and audited accounts of the respective parties immediate, therefore matter may be set-aside to the file of the Assessing officer for further verification and the assessee will produce the bank statement, audited accounts, and other necessary documents, if any, to prove cash credit. Therefore, Ld Counsel contended that one more opportunity should be given to the assessee to plead this issue before assessing officer.

40. On the other hand, Ld. DR for the Revenue submitted that bank statement is an important piece of evidence to establish whether loan amount was repaid in the subsequent year or not. The assessee has not submitted tax audit report aslo, so it is not possible to verify whether all payments were made in subsequent year or not, hence this issue may be remitted back to the file of Assessing Officer for verification.

41. We have heard both the parties. We note that assessee has not submitted the relevant documents, that is, bank statement to prove that loans have been repaid in the subsequent year, besides audited books, if any, were not submitted. The Ld. Counsel undertakes this responsibility to produce the bank statement and other relevant documents before the Assessing Officer. Therefore, we accept the prayer of the assessee and we are of the view that an opportunity should be given to the assessee to produce the bank statements and other documents to prove, identity, creditworthiness and genuineness of the cash credit. Therefore, we set aside the order of Id. CIT(A) and remit this issue back to the file of the Assessing Officer to adjudicate the issue in accordance with law.

42. In the result, ground no.4 raised by assessee is allowed for statistical purposes.

43. The ground Nos. 5 and 6 are general in nature therefore do not require adjudication.

44. In combined result, assessee's appeal is allowed partly for statistical purposes to the extent indicated above.

Order pronounced on 22/02/2023 by placing the result on the Notice Board.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

सूरत /Surat

दिनांक/ Date: 22/02/2023

*SAMANTA*

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. 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