

**IN THE INCOME TAX APPELLATE TRIBUNAL ‘F’ BENCH, MUMBAI**

**BEFORE SHRI S RIFAUH RAHMAN, AM AND  
MS. KAVITHA RAJAGOPAL, JM**

ITA No.964/Mum/2022  
(Assessment Year: 2012-13)

Vaibhav Dipak Shah 9 & 10, Dadarkar Building, 5/7 V.P. Road, C. P. Tank, Mumbai-400 004	Vs.	Dy. CIT, Central Circle-2(3) Mumbai
PAN/GIR No. AAGPS 2674 L		
<b>(Appellant)</b>	:	<b>(Respondent)</b>
<b>Assessee by</b>	:	Shri Om Kandalkar
<b>Revenue by</b>	:	Ms. Vranda U Matkari
<b>Date of Hearing</b>	:	16.12.2022
<b>Date of Pronouncement</b>	:	09.03.2023

**ORDER**

**Per Kavitha Rajagopal, J M:**

This appeal has been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) (‘ld.CIT(A) for short) – 48, Mumbai, passed u/s.250 of the Income Tax Act, 1961 (‘the Act’), pertaining to the Assessment Year (‘A.Y.’ for short) 2012-13.

2. The appeal is time barred by 836 days, for which the assessee had filed details as to the delay owing to the Covid-19 Pandemic and also for the reason that the assessee was travelling to Surat frequently to supervise his new proprietorship concern. The assessee has filed an Affidavit to condone the delay for the reason that the assessee has a good case on merits.

3. After hearing both the rival submissions and perused the materials on record, we are of the considered view that the delay in filing the present appeal may be condoned as delay caused due to ‘sufficient reason’.

4. The assessee has challenged the addition of Rs.1,32,45,297/- on account of peak balance of alleged bogus purchase, disallowance of deduction u/s.80D of the Act amounting to Rs.5,968/- and disallowance of 80G amounting to Rs.16,000/-.

5. The brief facts of the case are that the assessee is engaged in the business of rough and cut & polished diamonds in the name and style of 'M/s. Leo Gems' has been exporting and selling goods to diamond merchants outside and in India. The assessee filed its return of income for the impugned year dated 20.02.2012 declaring total income of Rs.47,27,334/- and was processed u/s. 143(1) of the Act. The assessee's case was selected for scrutiny and after issuing of statutory notice u/s. 143(2) and 142(1) of the Act, the assessment order dated 31.03.2015 was passed u/s. 143(3) of the Act, wherein the Assessing Officer (A.O. for short) made various additions/disallowances and determined the total income of the assessee at Rs.1,79,94,599/-.

6. The assessee was in appeal before the Id. CIT(A) who confirmed the said addition/disallowances made by the A.O.

7. Ground no. 1 of the appeal is general in nature and ground no. 2 pertains to addition of Rs.1,32,45,297/- made by the A.O. on account of peak balance of alleged bogus purchases, which was confirmed by the Id. CIT(A). It is observed that the A.O. had received information from DDIT, Investigation, Mumbai that the assessee was beneficiary of bogus purchase from various hawala parties and pursuant to the enquiry u/s. 131 of the Act dated 31.10.2012, the assessee being proprietary of 'M/s. Leo Gems' has admitted in his statement recorded on oath that he has been a beneficiary of the accommodation entries provided by various hawala parties. The A.O. observed that 'M/s.

Leo Gems' has taken accommodation entry during the impugned year from two parties specified below:

<i>Sr. No.</i>	<i>Name of the Hawala Dealer</i>	<i>TIN Number</i>	<i>Total Amount</i>
1	Deep Enterprises	27750595164V	31,085,117
2	Rashmi Enterprises	27580657871V	1,607,648
3			32,692,765

8. The A.O. further stated that the said dealers have given declaration to the Sales Tax department stating that they have issued bogus bills without sale of any goods to the assessee under various invoices, out of which the above two entities pertain to the impugned year. The assessee has denied the said fact in its submission by stating that the said information was merely on suspicion without any tangible evidence. The assessee further contended that it had tax invoices of the impugned purchases which have been made by account payee cheque for which the assessee is said to have complete quantitative detail recorded. The A.O. was not convinced with the contention of the assessee and had relied on the declaration filed by the hawala parties with the Sales Tax Department, Mumbai admitting that they have not supplied any goods to the assessee as per the purchase invoices and also that the said parties have not paid any sales tax on the bills raised on the assessee. The A.O. held that the bills issued by these suppliers were not genuine and that the assessee has failed to produce any documentary evidence to prove the genuineness of the purchase. The A.O. also relied on the assessee's statement recorded u/s.131 of the Act and concluded that the assessee has taken accommodation entry for the purpose of inflating its expenses. The A.O. relied on various decisions to show that the assessee has not discharged its primary onus to establish the genuineness of the purchase and that mere payment by account payee cheque is not the only criteria to

prove genuinity. The A.O. applied peak credit theory and made an addition of the impugned amount of Rs.1,32,45,297/- u/s. 69C of the Act.

9. The Id. CIT(A) upheld the addition made by the A.O. and rejected the assessee's contention that in the earlier years for A.Ys. 2008-09, 2009-10, 2010-11 and 2011-12, the Tribunal has made an addition of 5% on the bogus purchase which according to the Id. CIT(A) was not applicable in the present case as the A.O. for this impugned year has not considered 30% of the profit like in earlier years and has rather made the addition on peak credit of the bogus purchases. The Id. CIT(A) distinguished the earlier tribunal's order from this present appeal and upheld the action of the A.O. The Id. CIT(A) also relied on the statement of the assessee recorded u/s. 131 of the Act where the assessee is said to have admitted as being beneficiary of accommodation entries. The Id. CIT(A) relied on the decision of the Hon'ble Apex Court in the case of *CIT vs. Durgaprasad More* [1971] 82 ITR 540 (SC) and *Sumati Dayal vs. CIT* [1995] 214 ITR 801 (SC) and held that apparent was not real in assessee's case where the register was itself considered to be bogus. The Id. CIT(A) has also not considered the retraction statement of the assessee vide Affidavit dated 22.03.2013 and thereby upheld the addition made by the A.O.

10. The learned Authorised Representative (Id. AR for short) for the assessee contended that the Tribunal on identical facts had made disallowance @ 5% on the bogus purchase and on no change in the facts, prayed that the same may be applicable for the impugned year. The Id. AR further stated that the lower authorities have not disputed the sales of the assessee and for that reason the corresponding purchases should also be

considered. The Id. AR further stated that the purchase and sales were duly supported by the quantitative details furnished by the assessee and that the said transactions were carried out by proper banking channel. The Id. AR contended that the A.O. made an addition merely on the basis of the information from the Sales Tax Department and that the A.O. has failed to enquire and investigate, into the alleged bogus entities. The Id. AR further stated that peak credit theory was not to be applied in assessee's case and relied on the decision of the Tribunal in assessee's case for earlier years.

11. The learned Departmental Representative (Id. DR for short) for the Revenue, on the other hand, controverted the same and distinguished the tribunal's decision in earlier years for the reason that the A.O. had made addition on 30% of the gross profit which was restricted to 5% by the Tribunal for the previous years, whereas the impugned year the A.O. has made addition on peak credit and that the said decision of the Tribunal would not be applicable for this impugned year. The Id. DR relied on the decision of the lower authorities.

12. We have heard the rival submissions and perused the materials available on record. It is evident that on identical facts for A.Ys. 2208-09 to 2011-12, the tribunal by relying on the various decisions has held that for the nature of business carried out by the assessee, it is pertinent to estimate the profit @ 5% on the disputed purchases and had thereby directed the A.O. to make addition on 5% of the bogus purchases transacted by the assessee with the hawala parties. On perusal of the said decision, it is pertinent to point out that the facts of the said appeals are identical to that of the impugned year, except for the fact that the transactions was with different hawala party for the relevant

years, other than that we do not find any change in the circumstances pertaining to facts during the impugned year. We also find no justification in the action of the A.O. in applying peak credit theory for the purpose of making addition on bogus purchase. There is also no doubt in the purchases alleged to be bogus where neither the A.O. nor the Id. CIT(A) has disputed the corresponding sales made by the assessee. In the failure of identifying bogus sales, the purchases made by the assessee may be at best made from grey market from alleged bogus entities. The lower authorities have failed to substantiate if there was any latent or patent defect in the books of the assessee. There was no justification about the sales made by the assessee as to whether the same was genuine or sham transaction. As a necessary corollary since the corresponding sales was not said to be bogus, the purchases cannot also be held as 'bogus' except for the reason that the said purchases was made from bogus entities. We would like to place our reliance on the decision of Hon'ble Jurisdictional High Court in the case of *Pr. CIT vs. Nitin Ramdeoiji Lohia* [2022] 145 taxmann.com 546 (Bom) for the said proposition.

13. From the above observation and by respectfully following the above mentioned decisions, we are of the considered view that the addition should be restricted to 5% of the alleged bogus purchase and the A.O. is directed to estimate the profit at 5% on the bogus purchase. Hence, ground no. 2 & 3 are decided as above.

14. Ground nos. 4 & 5 pertains to the deduction of the claim u/s. 80D & 80G of the Act. It is observed that the A.O. has not made any discussion as to the said disallowance and the Id. CIT(A) has remanded this issue back to the A.O. for considering the assessee's claim subject to verification of the facts. We do not find any infirmity in the

order of the Id. CIT(A) in remanding this issue back to the A.O. for adjudicating the issue on the facts of the case. Hence, these two grounds may be remanded back to the A.O. for considering the claim of the assessee on the merits of the case. Hence, ground nos. 4 & 5 are allowed for statistical purposes.

15. In the result, the appeal filed by the assessee is partly allowed.

*Order pronounced in the open court on 09.03.2023*

Sd/-

Sd/-

(S. Rifaur Rahman)  
Accountant Member

(Kavitha Rajagopal)  
Judicial Member

Mumbai; Dated : 09.03.2023

Roshani, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai