

**IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR**

VIRTUAL HEARING

**BEFORE: DR. S. SEETHALAKSHMI, JM
&
SHRI RATHOD KAMLESH JAYANTBHAI, AM**

**ITA No. 136/Jodh/2023
(ASSESSMENT YEAR- 2014-15)**

Pushpa Chhajer A-56, S. R. Loonker and Company Shastri Nagar, Jodhpur	Vs	Asstt. Commissioner of Income Tax, Circle- 01, Jodhpur
(Appellant)		(Respondent)
PAN NO. ABWPC 3839 L		

Assessee By	Sh. Rajendra Jain, Adv.
Revenue By	Sh. S. M. Joshi, JCIT-DR
Date of hearing	06/07/2023
Date of Pronouncement	02/08/2023

ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by assessee and is arising out of the order of the Commissioner of Income Tax (Appeals), Udaipur-2 dated 27.03.2023 [here in after (ld. CIT(A)] for assessment year 2014-15 which in turn arise from the order dated 30.12.2016 passed under

section 143(3)/147 of the Income Tax Act, by the DCIT, Circle-01, Jodhpur.

2. The assessee has marched this appeal on the following grounds:-

“1. That on the facts and in the circumstances of the case, the Id CIT(A) grossly erred in upholding validity of order passed by the Id AO.

2. That on the facts and in the circumstances of the case, the Id CIT(A) grossly erred in upholding validity of notice u/s 148 of the Act.

3. That on the facts and in the circumstances of the case, the Id CIT(A) grossly erred in upholding validity of service of notice u/s 148 on husband of assessee.

4. That on the facts and in the circumstances of the case, the Id CIT(A) grossly erred in upholding the denial of opportunity to cross-examine of persons whose statement are foundation of proceedings u/s 148 and addition made in the assessment order.

5. That on the facts and in the circumstances of the case, the Id CIT(A) grossly erred in violating the principle of natural justice and also confirming arbitrarily allegation made by Id AO against the assessee.

6. That on the facts and in the circumstances of the case, the Id. CIT(A) grossly erred in sustaining addition of Rs. 1,99,74,893/- in respect of bogus purchases.

7. That on the facts and in the circumstances of the case, the Id CIT(A) grossly erred in upholding the finding of Id AO that purchases made from M/s Vinayak Enterprises are not genuine but bogus, without taken to consider real & true facts on record.

8. That on the facts and in the circumstances of the case, the authority below grossly erred in upholding the purchases are bogus without

appreciating that in order to achieve the reported sales, stocks and material consumed there must be corresponding purchases.

9. *That on the facts and in the circumstances of the case, the Id CIT(A) grossly erred in upholding the purchases are bogus solely on third party information, statements, particularly when the assessee has prima facie discharged the initial burden of substantiating the purchases through various legal & valid documentation.*

10. *That on the facts and in the circumstances of the case, the Id AO grossly erred in sustaining addition of Rs 1,99,74,893/ by disallowing purchase without considering real & true fact in right perspective and judicious manner.*

11. *That on the facts and in the circumstances of the case, the authority below grossly erred in making attempt to normal business transaction as something unusual and out of the ordinary only as un-discerningiy which is against the principal of natural justice.*

12. *That on the facts and in the circumstances of the case, the Id AO made addition/disallowance of Rs. 1,99,74,893/- in the returned income on arbitrarily manner without having any credible evidence and only on the basis of assumption and presumption.*

13. *That on the facts and in the circumstances of the case the Id. AO erred in charging interest u/s 234B and 234C.*

14. *That the petitioner may kindly be permitted to raise any additional or alternative ground at or before the time of hearing.*

15. *The petitioner prays for justice and relief.”*

3. The facts as culled out from the record are that the return of income for the A.Y 2014-15 was electronically furnished on 25.11.2014 declaring a total income of Rs. 75,62,630/-. The case was accordingly processed u/s 143(1) accepting the returned income.

Further the case was reopened u/s 148 of the I.T. Act, 1961 after getting prior approval of Joint Commissioner of Income-tax, Range-01, Jodhpur vide letter No. 1109 dated 28.12.2015. A notice u/s 148 of I.T. Act, 1961 was issued on 29.12.2015 by the ITO, Ward-1(5), Jodhpur, which was duly served upon the assessee in time. The assessee is a proprietor of the firm namely M/s Bhaval Exports. The firm is engaged in the business of manufacturing and exporting of wooden handicraft items.

3.1 Survey u/s 133A of the I.T. Act, 1961 was carried out at assessee's premises on 09/09/2015. During survey, various documents like purchase bills, vouchers, computer hard disk were impounded. On perusal of the details contained in the above documents, it was noticed that the assessee has shown Rs. 1,99,74,893 as purchases from M/S Vinayak Enterprises. However, from the post survey inquiry carried out by the AO and from the other evidences gathered (like bank statement etc.), physical verification by the Inspector, it was noticed that no actual goods have been purchased from M/s Vinayak Enterprises and only bills have been obtained. Considering the above fact, it was believed that the

purchases to the tune of Rs. 1,99,74,893 shown in the name of M/s Vinayak Enterprises are not genuine but bogus. The assessee has inflated his purchases to suppress his income by Rs. 1,99,74,893/-.

3.2 The Assessing Officer conducted an inquiry from the bank statement and found that the assessee had made payment against alleged purchase from M/s Vinayak Enterprises through check/RTGS, Punjab National Bank, Chopasani Road, Jodhpur and the same amount was deposited in the bank account of M/s Vinayak Enterprises maintained with Corporation Bank, L. K. Tower, Chopasani Road, Jodhpur. The Id. AO after verifying the bank statement of M/s Vinayak Enterprises noted that as soon as the amount credited in the bank. The same is withdrawn through self cheques or by cash. The detailed findings were recorded in the assessment by way of tabulating all the transactions in table at page 4 of assessment order.

3.3. Further, the Id. AO made inquiry as to who operate the bank account and found that Mr. Manish and Dinesh operate these accounts Mr. Suresh Dagwal, proprietor of M/s Vinayak Enterprises stated. He used to accommodate fake/bogus purchases. Based on

these facts, inspector was deputed to verify the genuineness of the concern M/s Vinayak Enterprises and it was reported by the inspector that at the given concern, no such concern is in existence. Therefore, summons u/s 131 of the Act was also issued to Sh. Suresh Kumar and his statement was recorded wherein he stated that he signed blank cheque and bill books and handed over the same to Sh. Shailendra Singh, Jodhpur. He did not know about the usage of these cheques and bill books.

3.4 The Id. AO also gathered that M/s Vinayak Enterprises is registered with Sales Tax Department and therefore, inquiry were made with Sales Tax Department. It was gathered that said concern registration has been cancelled by the department and huge demand was created in the name of said assessee. The statement of the assessee was also gathered wherein she says that her husband Sh. Mahendra Chajjer looks after the business and he is key person. Based on this information a show cause notice was issued to the assessee as to why the purchase of Rs. 1,99,74,893/- should not be treated as bogus purchase and added to the total income of the assessee. The assessee filed as written reply dated 26.12.2016. The

Id. AO based on these observations held that the assessee has already declared GP of Rs. 2,53,29,531/-. Now, as the purchases of Rs. 1,99,74,893/- which were found bogus are deducted from the purchases and subsequently, the GP of the assessee for AY 2014-15 would be Rs. 4,53,04,424 against GP declared by the assessee Rs.2,53,29,531/-. Hence, Rs. 1,99,74,893/- (Rs. 4,53,04,424 – Rs.2,53,29,531) which remained undisclosed is required to be added back to the total income of the assessee to arrive at the correct taxable income of the assessee.

4. Aggrieved from the order of Assessing Officer making the above addition, the assessee preferred an appeal before Id. CIT(A) and the appeal of the assessee was dismissed. So far as to ground of addition Rs. 1,99,74,893/-. The relevant finding of Id. CIT(A) is recorded at para 5.3 which is reproduced herein below:

“5.3 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order of the Income tax act, 1961 for the year under consideration.

It is noted that the AO has conducted enquiries in this case. Physical as cond verification and inquiry from the seller, inquiry from bank, inquiry from sales tax department, inquiry from Mr. Shailendra Singh and verification of bills furnished. On the basis of these inquiries the AO came to the conclusion that the purchases made by the appellant are not genuine. The AO has discussed the findings in detail in the assessment order.

The appellant argued that evidences furnished with regard to sale bill, address, mobile number, evidence of bank transaction etc. therefore, the purchase made by her are genuine. I find that all these evidences are examined by the AO and the seller himself admitted that he did not supply goods to the appellant. Mr. Suresh Dhawal proprietor of M/s Vinayak enterprises admitted that the bank account were not in his knowledge but in the knowledge of one Mr. Shailendra Singh. The AO recorded the statement of Mr. Shailendra Singh also which fortifies the stand of the AO that purchases made by the appellant were not genuine. The AO has also noted that the amount deposited in the account of M/s Vinayak Enterprise was withdrawn through self cheque on the same day. The appellant argued that no evidence is found by the AO that the appellant received back the cash. The cash transactions takes place in secret and direct evidence in such cases are very difficult to gather by the AO. However, the AO has collected enough circumstantial evidences to prove that the appellant received back the amount in cash.

In such situations the surrounding circumstances are required to be seen. Hon'ble Supreme Court in the case of Sumati Dayal Vs CIT [1995] 80 Taxman 89 (SC)/[1995] 214 ITR 801 (SC)/[1995] 125 CTR 124 (SC)[28-03-1995] held as under-

"It is, no doubt, true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. But in view of section 68, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is in the opinion of the Assessing Officer, not satisfactory. In such case there is prima facie evidence against the assessee, viz., the receipt of money, and if he fails to rebut the same, the said evidence being unrebutted, can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably

In the instant case, the amount was credited in capital account in the books of the appellant. The appellant had offered her explanation about the said receipts being her winnings from races. The said explanation had been

considered in the light of the sworn statement of the appellant and other material on record The ITO and the AAC had not accepted the explanation offered by the appellant. The two members constituting the majority in the Settlement Commission had also taken the same view. There was no dispute that the amounts were received by the appellant from various race clubs on the basis of winning tickets presented by her. What was disputed was that they were really the winnings of the appellant from the races. This raised the question whether the apparent could be considered as real. Apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. The Chairman of the Settlement Commission, in his dissenting opinion, had laid emphasis on the fact that the appellant had produced evidence in support of the credits in the form of certificates from the racing clubs giving particulars of the crossed cheques for payment of the amounts for winning of jackpots, etc. The Chairman had rejected the contention regarding lack of expertise in respect of the appellant and had observed that the expertise was the last thing that was necessary for a game of chance and anybody had to go and call for five numbers in counter and obtain a jackpot ticket and that books containing information are available which are quite cheap. This was a superficial approach to the problem. The matter had to be considered in the light of human probabilities. The Chairman of the Settlement Commission had emphasised that the appellant did possess the winning ticket which was surrendered to the race club and in return a crossed cheque was obtained. It was a neutral circumstance, because if the appellant had purchased the winning ticket after the event, she would be having the winning ticket with her which she could surrender to the race club. The observation by the Chairman of the Settlement Commission that the 'fraudulent sale of winning ticket was not an usual practice but was very much of an unusual practice', ignored the prevalent malpractice that was noticed by the District Taxes Enquiry Committee and the recommendations made by the said Committee which led to the amendment of the Act by the Finance Act, 1972 whereby the exemption from tax that was available in respect of winnings from lotteries, crossword puzzles, races, etc. was withdrawn. Similarly the observation by the Chairman that if it was alleged that these tickets were obtained through fraudulent means, it was upon the allegor to prove that it was so ignored the reality. The transaction about purchase of winning ticket took place in secret and direct evidence about such purchase would be rarely available. An inference about such a purchase had to be drawn on the basis of the circumstances available on the

record. Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record, an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. The majority opinion after considering surrounding circumstances and applying the test of human probabilities had rightly concluded that the appellant's claim about the amount being her winning from races, was not genuine. It could not be said that the explanation offered by the appellant in respect of the said amounts had been rejected unreasonably and that the finding that the said amounts were income of the appellant from other sources was not based on evidence."

As per the guidelines of the above case as held by the Hon'ble Supreme Court, the matter is to be considered in the light of human probabilities

in this case there is prima facie evidence against the appellant, viz., the seller has denied that material was supplied to the appellant, the existence of the seller entity was also not found and the appellant failed to rebut the same, the said evidence being unrebutted, can be used against the appellant by holding that the appellant failed to substantiate the purchase made by him.

This raised the question whether the apparent could be considered as real. Apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. The matter had to be considered in the light of human probabilities. The appellant has to prove beyond doubt about the purchase made by her failing which the allegations of the AO are presumed to be true.

It needs to be emphasized that standard of proof beyond reasonable doubt has no applicability in determination of matters under taxing statutes. In the present case, it is clear that apparent is not the real as evidenced from the investigation done by the department. Further, the Hon'ble Supreme Court, in the case of Chuhar Mal Vs CIT (1988) 172 ITR 250, highlighted the fact that the principle of evidence law are not to be ignored by the authorities, but at the same time, human probability has to be the guiding principle, since the AO is not fettered, by technical rules evidence, as held by the Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills v CIT (1954) 261 TR 775. The Hon'ble Supreme Court, in the case of Chuhar Mel V CIT (supra) held that what was meant by saying that evidence Act did not

apply to the proceedings under Income-tax Act, 1961, was that the rigors of Rules of evidence, contained in the Evidence Act was not applicable; but that did not mean that when the taxing authorities were desirous of invoking the principles of Evidence Act, in proceedings before them, they were prevented from doing so. It was further held by the Hon'ble Apex Court that all that Section 110 of the Evidence Act, 1872 did, was 'to embody a salutary principle of common law, jurisprudence viz, where a person was found in possessing of anything, the onus of proving that he was not its owner, was on that person. Thus, this principle could be attracted to a set of circumstances that satisfies its conditions and was applicable to taxing proceedings.

I am in agreement with the AO that the transactions relating to purchase made from M/s Vinayak Enterprises come within the ambit of "suspicious transactions", and therefore the rules of suspicious transactions would apply to the case. Payment through Banks, and other such features are only apparent features. The real features are the amount was withdrawn by using self cheque immediately after depositing. Therefore, I have to reach the inevitable conclusion that the transactions as discussed by the AO fall in the realm of "suspicious" and "dubious" transactions. The AO has therefore necessarily to consider the surrounding circumstances, which he indeed has done.

The tax liability in the cases of suspicious transactions, is to be assessed on the basis of the material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information/ evidence available with AO.

In this case the appellant has failed to disprove the findings of the AO. The appellant has not proved actual delivery of goods, delivery challan, bill of transportation, gate pass, loading and unloading expenses, stock register, store register etc. However the appellant failed to produce any of these evidences. The seller has denied to have made any sale to the appellant. The purchase bills also do not carry description of transportation of goods purchased. In view of these facts the AO concluded that goods never reached to the appellant and only paper entry of purchase was made. The AO also concluded inquiry from sales tax department where it is noted that M/s Vinayak Enterprises was found to be dummy and bogus by sales tax department and its registration was cancelled. Considering these glaring fact found by the AO, I do not have any hesitation in confirming the addition made by AO in principle.

With regard to GP comparison the AO compared GP of similar enterprises and found that the normal GP in handicrafts business is 20-25 percent. The appellant declared GP of 8.5%. After adding the amount of bogus purchase the GP of the appellant become 15.34 % of the sales. Therefore, the AO concluded that from this comparison also it becomes evident that the GP was suppressed by way of entering bogus purchase.

The AO has also considered the argument of the appellant that if the goods were not purchased how the sale was made. The appellant is manufacturer and not a trader. It was held that only material procured from the parties other than M/s Vinayak Enterprises was used to manufacture the products which were sold. To increase direct expenditure, the bogus purchase bills were procured.

The appellant has tried to question the statement of Mr. Suresh Dagwal (The seller) and Mr. Shailendra Singh. These are witness of the appellant as the appellant was supposed to produce them before the AO. When the appellant failed to produce them, the AO recorded their statements. Therefore, the AO is justified on relying the statements recorded. The appellant only made assertions to reject the statements without any supporting evidences, hence, the assertions made by the appellant are rejected. The appellant has miserably failed to furnish evidences to prove genuineness of the purchases.

In view of these facts, I find that the AO has based the addition on facts after enquiries from the parties involved. I do not find any infirmity in the order made by the AO. The addition made by the AO is upheld.

This ground of appeal is treated as dismissed.”

5. As the assessee did not find any favour from the appeals filed before Id. CIT(A). The assessee has preferred the present appeal as per the grounds raised in para 2 above.

6. A propose to the grounds so raised, the Id. AR of the assessee has filed the paper book containing the following evidences:

S. No.	Particulars	Page No.
1	Copy of written submission submitted before the Id. CIT(A)	1-16
2	Copy of Return for A.Y 2015-16	17
3	Copy of audited financial statement along with return and computation of income for A.Y 2014-15	18-46
4	Copy of notice issued u/s 148 of the Act by the ITO, Ward-1(5), Jodhpur	47
5	Copy of reasons recorded while issuing notice u/s 148 of the Act.	48-50
6	Copy of objection raised by the assessee against the reasons recorded u/s 148 of the Act.	51-52
7	Copy of disposal of objection raised by the assessee	53-55
8	Copy of show cause notice dated 20/12/2016	56-57
9	Copy of letter dated 26/12/2016 in response to show cause notice issued by the Ld. AO	58-60
10	Copy of Bills, ledger account and other supporting evidence in respect of transaction with M/s Vinayak Enterprises.	61-202

7. The Id. AR of the assessee also filed detailed written submission and the same is extracted herein below:-

- 1] “Regarding G. A. No. 1 to 4
 - a] That the appellant is individual and engaged in business of trading & manufacturing and export of handicraft items. The appellant had maintained day to day books of account, each & every transaction are recorded and supported from documentary evidences. The books of account so maintained by assessee are subject to audit u/s 44AB of the Act.
 - b] That on 25/11/2014, the appellant had filed the ITR and financial statement through on line and declaring income of Rs. 75,62,630/- from above sources. The return filed by assessee was processed on income declared u/s 143(1) of the Act.

- c] That on 09/09/2015, a survey u/s 133A was carried out at business premises of appellant. At the time of survey, the authorized officer had not found any discrepancy in respect of cash, stock, purchase, sales, expenditure etc and also not found any incrementing material which shows any transactions outside the books of account. The books of account and other relevant record on the basis of which ITR filed for year under consideration were available and verified by survey party.
- d] That on 29/12/2015, the Income Tax Officer Ward-1(5) had issued the notice u/s 148 to appellant. The notice was not served on assessee but was served on husband of assessee.
- e] That the Department had provided the copy of reasons recorded to the appellant which is available at P.B. Page 48 to 50 of paper book. Perusal of reasons recorded the Id AO acquired the jurisdiction only on the basis of assumption and presumption particularly when the complete documentary evidences in respect of purchases made from M/s Vinayak Enterprises are recorded in the books of accounts and payment made through banking channel are found during the course of survey and as per provisions of section of provisions of sub section (ii) of section 292C of the Act are genuine and correct.
- f] That the statement as relied by the Id AO in the reasons recorded which cannot be considered as tangible material in light of decision of Hon'ble Supreme Court, Hon'ble High Courts. The Hon'ble Rajasthan High Court in the case of Micro Marbles Pvt. Ltd. (P.B. Page 203 to 216) on identical facts has held the reopening on the basis of statement of third party cannot be ground for reopening.
- g] In respect of amount withdrawn from bank by M/s Vinayak Enterprises and report of Inspector that no such concern is in existence at the given address . , the Hon'ble ITAT, Jaipur Bench in case of ITO v. Kanchanwela Gems reported in 122, TTJ 854 Undisputedly, after completion of transaction a purchaser cannot have any control over the suppliers and suppliers are always at liberty to use the money paid to them against the goods sold 'by them. Further also the Hon'ble Calcutta High Court in the case of Diagnostics v CIT reported at 334 ITR 111 has held that - If an assessee took care to purchase materials

for his business by way of account payee cheques from a third party and subsequently, three years after the purchase, the said third party does not appear before the Assessing Officer pursuant to the notice or even has stopped the business, the claim of the assessee on that account cannot be discarded as non-existent.

- h] That during the course of survey and subsequently the following documentary evidences and information found and furnished by the assessee in support of genuineness of purchase transactions with above party.
- i] Copies of purchase bills of Wooden which is raw material of appellant. At the time of survey the Survey Party himself has found such bills and nowhere found any excess/shortage of stock and cash. Therefore the genuineness of bills of purchase cannot be doubted.
 - ii] That such purchases are duly recorded in the books of accounts and part of audited trading account. The audited financial statements for the year under consideration are found at the time of survey.
 - iii] That the payment made through banking channel and duly reflected in the bank statement.
 - iv] That the purchases made by appellant are subject to VAT and the appellant had paid the VAT to supplier which is duly recorded in the return of VAT. The Commercial Taxes Department has accepted such purchase transactions as genuine in the case of appellant.
 - v] That at the time of survey neither any incrementing material nor any evidence found which shows any business transaction executed by appellant outside the books of accounts.
- i] In the case of 'CIT Vs Smt Maniben Valji Shah', 283 ITR 453 the Hon'ble Bombay High Court quashed assessment based on notice under section 148 of the Act where proceedings under section 147 was initiated to verify the source of Investment made in purchase of house.

It was held by the Hon'ble High Court that: "Reassessment Reasons to believe fishing enquiry impugned notice clearly indicates that the AO merely wanted to know the details of sources of funds invested by the assessee in purchasing a flat AO had no basis to reasonably entertain a belief that any part of income of the assessee had escaped assessment and that such escapement was by reasons of any omission or failure on the part of the assessee to disclose fully and truly all material facts action of the AO in reopening the assessment was not valid."

j] In the case of 'Bakulbhai Ramanlal Patel Vs ITO', 56 DTR 0212 the Hon'ble Gujarat High Court held that: "Where the reasons recorded reflect that the matter requires detailed investigation and further verification, the AO has reason to suspect and not reason to believe that income chargeable to tax has escaped assessment and therefore, the assumption of jurisdiction by the AO is invalid and as such, the impugned notice under s. 148 is not sustainable and is quashed."

k] Important decision of Hon'ble Rajasthan High Court in the case of Micro Marbles Private Limited V/s ITO Ward-1, Chittorgarh D.B. Civil Writ Petition No. 13719/2021 dated 04/01/2023. The Hon'ble Jurisdictional High Court held as under:-

31. Thus, in the light of the decisions of the Delhi and the Bombay High Courts, as referred to above, the non-supply of the material, especially the documents of entry in the books of M/s Sanmatri Gems Pvt. Ltd. and the statement of Deepak Jain recorded under Section 132 (4) of the Act, is sufficient to vitiate the proceedings.

32. It may be noted that the statement recorded under Section 132 (4) of the Act can be used in evidence for making the assessment only if such statement is made in context with other evidence, or material discovered during search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger the assessment.

33. In view of the aforesaid facts and circumstances, we are of the opinion that shorn of all other technical aspects which may have been raised before us, the very fact that the material referred to in the "reasons to believe" was not supplied to the petitioner, the entire proceedings for the reopening of the assessment and leading to the consequential assessment stand vitiated in law.

34. Accordingly, the impugned notice dated 30.03.2021 and the order dated 18.08.2021 dismissing the objections of the petitioner are hereby quashed and all consequential proceedings including the assessment order dated 29.03.2022 are declared to be illegal, null and void with liberty to the respondents to take up a fresh exercise for reassessment, if necessary, in accordance with law

From the above the notice u/s 148 issued by the Id AO is bad in law and against the principle of natural justice.

Regarding without valid & legal jurisdiction

- l] It is further submitted that the appellant had filed the ITR u/s 139 for the year under consideration (A.Y. 2014-15) on 25/11/2014 declaring total income of Rs. 75,62,630/- and ITR for A.Y. 2015-16 was filed on 30/09/2015 declaring total income of Rs. 70,82,220/-. (P.B. Page 17)
- m] That as per guidelines of Hon'ble CBDT and action plan the valid & legal jurisdiction to issue notice u/s 148 with ACIT/ DCIT, Circle -1 as the last income declared was more than 15,00,000/- whereas in the case of assessee the notice u/s 148 had been issued by ITO, Ward - 1(5), Jodhpur. Therefore the notice issued by ITO, Jodhpur is bad in law and without jurisdiction. In this regard I rely on decision of Hon'ble ITAT, Kolkata Bench in the case of Gajmukh Mercantile Pvt. Ltd. (P.B. Page 225 to 229). Further also the Hon'ble ITAT, Kolkata Bench in the case of Shake Akhtar Hossain. I.T.A. No. 2572/Kol/2019 dated 18/03/2020 held as under:-

"We note that the CBDT Instruction is dated 31.01.2011 and the assessee has filed the return of income on 29.03.2013 declaring total income of Rs.50,28,040/-. As per the CBDT Instruction the monetary limits in respect to an assessee who is an individual which falls under the category of 'non corporate returns' the ITO's increased monetary limit was upto Rs.15 lacs; and if the returned income is above Rs. 15 lacs it was the AC/DC. So, since the returned income by assessee an individual is above Rs.15 lakh, then the jurisdiction to assess the assessee lies only by AC/DC and not ITO. So, therefore, only the AC/DC had the jurisdiction to assess the assessee. It is settled law that serving of notice u/s. 143(2) of the Act is a sine qua non for an assessment to be made u/s. 143(3) of the Act. In this case, notice u/s.

143(2) of the Act was issued on 06.09.2013 by ITO, Ward-1, Haldia when he did not have the pecuniary jurisdiction to assume jurisdiction and issue notice. Admittedly, when the ITO realized that he did not had the pecuniary jurisdiction to issue notice he duly transferred the file to the ACIT, Circle-27, Haldia on 24.09. 2014 when the ACIT issued statutory notice which was beyond the time limit prescribed for issuance of notice u/s. 143(2) of the Act. We note that the ACIT by assuming the jurisdiction after the time prescribed for issuance of notice u/s. 143(2) of the Act notice became quorum non judice after the limitation prescribed by the statute was crossed by him. Therefore, the issuance of notice by the ACIT, Circle-27, Haldia after the limitation period for issuance of statutory notice u/s. 143(2) of the Act has set in, goes to the root of the case and makes the notice bad in the eyes of law and consequential assessment order passed u/s. 143(3) of the Act is not valid in the eyes of law and, therefore, is null and void in the eyes of law. Therefore, the legal issue raised by the assessee is allowed. Since we have quashed the assessment and the appeal of assessee is allowed on the legal issue, the other grounds raised by the assessee need not to be adjudicated because it is only academic. Therefore, the additional ground raised by the assessee is allowed.

10. Applying the propositions of law laid down in these case laws to the facts of this case we have to necessarily hold that the notice issued to the assessee u/s 143(2) of the Act by the Id. ACIT, Circle-31, Kolkata was without jurisdiction. Hence the assessment framed in pursuant to this notice is bad in law. The appeal has to be allowed on this ground."

In light of above the notice issued u/s 148 is without jurisdiction and against the provisions of law.

Regarding service of notice

n] It is further submitted that the husband of assessee Shri Mahendra Chajjer was not authorized for appearing the assessment proceeding or obtaining any notices issued by the Department rather he is authorized at the time of survey to assist the department as he having knowledge of such business activities. The relevant portion of statement of Shri Mahendra Chajjer in this regard reads as under: -

“प्रश्न-2 जैसा कि श्रीमती पुष्पा छाजेड़ (प्रो. मै. भवाल एक्सपोर्ट्स) ने अपने बयान में कहा है कि इस फर्म व इससे सम्बन्धित सभी सवालों का जवाब देने के लिए आपको अधिकृत किया है क्या आप इससे सहमत है?

उत्तर— हॉ मैं मैसर्स भवाल एक्सपोर्ट्स व इससे जुड़े सभी सवालॉ का जवाब देने के लिए तैयार हूँ।”

- o] Therefore the observation made by the Id AO and finding recorded by the Id CIT(A) is apparently contrary and irrelevant as Shri Mahendra Chajjer husband of assessee was legally not authorized person for obtaining the notice u/s 148 issued by Id AO. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of RK Upadhyaya Vs. Shanabhai P. Patel (166 ITR 163). Further placed reliance on the following decisions:
- i. CIT vs. Chetan Gupta (2016) 382 ITR, Delhi High Court
 - ii. CIT vs. Eshaan Holding (P) Ltd. 344 ITR 541, Delhi High Court
 - iii. ITO vs. Hepta Developers Pvt. Ltd. ITA No. 3608 of 2014 (ITAT Delhi) Date of order 08.07.2015
 - iv. CIT vs. Avtar Singh (P&H) (HC), 219 CTR 588
 - v. CIT vs. Eqbal Singh Sindhana 304 ITR 177 (Delhi)
 - vi. ACIT vs. Vindhya Talylinks Ltd. 107 TTJ 149 (JAB)(TM) CIT vs. Hotline International (P) Ltd. 296 ITR 333 (Del)
 - vii. CIT vs. Laxmi Narain 168 Taxman 128 (P&H) (HC)
 - viii. Ram Singh Mathur vs. ITO, ITA 834/2005, date of order 21.09.2007 (Delhi ITAT)
 - ix. Venkat Naicken & Anr. vs. ITO, 242 ITR 141 (Madras High Court)
- p] That on identical facts the Hon'ble Allahabad High Court in the case of CIT V/s Ashok Kumar Bharti and Vijay Kumar 198 CTR ALL 260 after considering the principle laid down by various Hon'ble Courts held that:-
“ 14. In view of the above principle of law laid down by the various Courts, it is settled that the notice under Section 148 of the Act is a jurisdictional notice and unless a proper and valid notice is issued and served, jurisdiction to make the assessment cannot be assumed. Notice under Section 148 of the Act has been held as a condition precedent for a valid assessment. It has also been held that in the notice the correct status should be mentioned and if the person has a dual capacity, the correct status of a person against whom reassessment order is proposed to be made is to be mentioned in the notice under Section 148 of the Act and in the absence of a notice to the assessee against whom reassessment order is proposed, the said order is held to be invalid.”

q] Further also rely on the decision of Hon'ble ITAT, Jaipur Bench in the case of Charan Singh (P.B. Page 217 to 224).

In light of above the service of notice issued u/s 148 is bad in law and without jurisdiction.

2] As regards G. A. No 5 to 12

a] No incrementing material evidences or information found as a result of survey which suggested any business transactions outside the books of account.

b] No discrepancy found in stock & cash found and as per books of account at the time of survey.

c] The complete books of account, bills vouchers and other allied record of business activities for year under consideration were found and sized by department in which complete details of purchase and export sales etc are recorded and supported from credible evidences.

d] For genuineness of purchases made from Vinyak Enterprises the following evidences furnished by assessee during the assessment proceedings:-

i. Purchase bills subject to VAT

ii. Bank statement which shows the payment made through banking channel by appellant

iii. The Assistant Commissioner CT Circle 'C' the Commercial Tax Department of appellant had confirmed the purchase made by appellant from above party are accordance with provision of law [AO order Page 14]

iv. The purchases made from such party are duly recorded and part of audited trading account and income earned on such business transaction was offered for taxation.

v. The supplier Vinyak Enterprises had also recorded & disclosed such purchase transaction and the payment of same received through banking channel as reflected in their bank statement.

vi. The comparative position of sales and purchases with profit earned from A.Y. 2011-12 to 2017-18

e] The Hon'ble Calcutta High Court in the case of Diagnostics v CIT reported at 334 ITR 111 has held that - " However, as regards the

payments made to M/s. Selvas Photographic are concerned amounting to Rs. 3,12,302, we find that those have been made by account payee cheques and those have been encashed through the bankers of M/s.Selvas Photographic. It appears that according to the appellant, at the time of assessment, the appellant had no business transaction with M/s. Selvas Photographic and consequently, the said party did not co-operate with the Assessing Officer. However, the transaction having taken place through account payee. cheques, we are unable to accept the contention of Mr. Agarwal, the learned advocate appearing for the Revenue that the transaction was a non-existent one. If an assessee took care to purchase materials for his business by way of account payee cheques from a third party and subsequently, three years after the purchase, the said third party does not appear before the Assessing Officer pursuant to the notice or even has stopped the business, the claim of the assessee on that account cannot be discarded as non-existent.

- f] The Hon'ble ITAT, Jaipur Bench in case of ITO v. Kanchanwela Gems reported in 122, TTJ 854 has held under:

"The assessee had 'furnished all necessary information including name, address, PAN, ,RST/CST numbers and telephone numbers of the suppliers, supported with documents which was expected from a prudent " purchaser to establish the genuineness of claimed transaction; besides the payments had been made through account-payee cheques and goods purchased from the four parties had been exported by the assessee in the same shape,' size and weight, duly verified by the customs authorities, The Assessing Officer was not justified in doubting the genuineness of the claimed purchases made by the assessee from the four suppliers and making addition merely on basis that on subsequent occasion the parties were not found on the given addresses or in some other cases some connected person to the supplier had stated that they were only issuing bills without supplying goods or that the money paid by the 'assessee against the purchases was withdrawn, by those parties. Undisputedly, after completion of transaction a purchaser cannot have any control over the suppliers and suppliers are always at liberty to use the money paid to them against the goods sold 'by them. Thus, in the absence of any positive evidence that the goods were not purchased from the above parties but from some named person or that the money paid by the assessee against the goods was ultimately' returned to the

assessee by the' suppliers, there was no occasion before the Assessing Officer to deny the claimed purchases, especially when the genuineness of the export of those goods by the assessee had been accepted by the Assessing Officer. The Commissioner (Appeals) had, thus, rightly deleted the addition"

- g] Hon'ble Supreme Court in the case of CIT Vs Odeon Builders Pvt Ltd 418 ITR 315 wherein the Hon'ble Court upheld the deletion of the disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO. In this case it was held:

"We have perused the review petition and find that the tax effect in this case is above ₹ 1 crore, that is, 6,59,27,298/-. Ordinarily, therefore, we would have recalled our order dated 17th September, 2018, since the order was passed only on the basis that the tax effect in this case is less than ₹ 1 crore.

However, on going through the judgments of the CIT, ITAT and the High Court, we find that on merits a disallowance of ₹ 19,39,60,866/- was based solely on third party information, which was not subjected to any further scrutiny. Thus, the CIT (Appeals) allowed the appeal of the assessee stating:

"Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s. Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for ₹ 19,39,60,866/-, is directed to be deleted."

The ITAT by its judgment dated 16th May, 2014 relied on the self same reasoning and dismissed the appeal of the revenue. Likewise, the High court by the impugned judgment dated 5th July, 2017, affirmed the judgments of the CIT and ITAT as concurrent factual

findings, which have not been shown to be perverse and, therefore, dismissed the appeal stating that no substantial question of law arises from the impugned order of the ITAT."

h] Agson Global Pvt. Ltd. V. ACIT (2019) 76 ITR 504 (Delhi)(Trib.)

S. 37(i) : Business expenditure-Bogus purchases-Entire purchase and sale transactions duly recorded in regular books of account of all parties-Entire transactions routed through regular banking channels-No incriminating documents with respect to purchases and sales found in search-Purchases are genuine-Addition is held to be not justified.

i] Hon'ble Pubjab and Haryana High Court in case of CIT vs. Prem Pal Gandhi in ITA No. 95/2017 dated 18.01.2018. The Hon'ble High Court made an observation when the assessee produced the supporting evidence to prove the genuineness of the transactions and the AO has failed to produce any counter evidence to disprove the evidence produce by the assessee it was held that the transactions cannot be treated as bogus merely on the basis of statement without any corroborating evidence brought by the Assessing Officer.

Regarding opportunity to cross-examination,

j] That the Id AO & CIT(A) consciously and deliberately had violated the principle of natural justice by denial of opportunity to cross-examine, particularly when the foundation of allegation in so called reasons recorded and while making addition are statements recorded back of assessee and utilized the same. The Hon'ble Apex Court in C.Vasantlal & Co. vs. CIT (1962) 45 ITR 206 (SC) observed as follows:

"The Income-tax Officer is not bound by any technical rules of the law of evidence. It is open to him to collect materials to facilitate assessment even by private enquiry. But if he desires to use the material so collected, the assessee must be informed of the material and must be given an adequate opportunity of explaining it'. Accordingly, denial of opportunity to cross-examine has been held to be clearly illegal and unsustainable apart from being violative of natural justice."

i. Recently Hon'ble Delhi High Court in the case of PCIT V/s M/s Jay Ace Technologies Ltd, in ITA 358/2022 & CM APPL. 42277/2022 dated 26.09.2022, held as under:-

13. In any event, in the present cases, as the Respondents-Assessees were denied the opportunity to cross-examine Mr. Rajesh Agarwal, despite a specific request, this Court is in agreement with the ITAT that his statement needs to be excluded and cannot be relied upon as a piece of evidence to make any addition. In fact the Supreme Court in the case of M/s Andaman Timber Industries vs. CCE (SC), 127 DTR 241 has held "...not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.

- ii. Further, also referring to the decisions of Hon'ble Supreme Court in case of Kishinchand Chellaram reported in 125 ITR 713 and Andaman Timber Industries (dated 2 September, 2015 in Civil Appeal No. 4228 of 2006), it is a trite law when the statement of a person is to be used in evidence against any other person, such other persons should be given an opportunity of cross examination and in the present case., the assessee specifically asked for the cross examination which was denied arbitrarily by the Assessing Officer.
- iii. The Hon'ble Rajasthan High Court in the case of CIT v/s Smt. Sunita Dhadda reported in 406 ITR 220 which was approved by Hon'ble Supreme Court reported in 403 ITR (St.) 309. The Hon'ble High Court held as under: -

"income from undisclosed sources- burden of proof - "on money" said to have been received by assessee treated as income on basis of material recovered from third party- burden of proof on department to show consideration passed - failure to examine third party and allow cross- examination - deletion of addition by tribunal - just and proper - income -tax act, 1961, s. 69."

In light of above submission & judicial decisions, I humbly request your Honour kindly deleted the addition.

Alternative Submission, It is settled principle of law that "Entire purchase cannot be added to income when assessee not able to prove genuineness of supplier, restricted to profit element embedded in bogus purchases. Therefore it is humbly submits that the Id AO & CIT(A) had

treated entire purchase made from such party as profit without taken to consider the binding decision of law. P.B. Page 230 to 236.”

8. The Id. AR of the assessee argued that the assessee challenged reopening of assessment in Ground No. 1 to 5 and Ground No. 5 to 12 are related to the addition of Rs. 1,99,74,893/- made on account of alleged bogus purchases. He submitted that the Id. AO added the entire purchase, the Id. AO while making the assessment has not invoked the provision of section 145(3) of the Act and has not given specific opportunities to the assessee to substantiate the merits of the case. The book results are not rejected and therefore, the addition for the alleged bogus purchase to which the sales is also not doubted/disputed, the addition made is required to be deleted.

9. Per contra, the Id. DR relying on extensive inquiry made by the Assessing Officer and confirmed by the order of Id. CIT(A) requested to consider the detailed finding of the lower authorities and thus supported the orders of the lower authorities.

10. We have considered the rival contentions, perused the material available on record and gone through the findings of the lower

authorities recorded in their respective orders. The bench noted that against the allegation made by the revenue the assessee has not demonstrated that the contentions of the department can be put aside. The bench has also noted that the Id. AO has categorically stated by bringing various statement and evidence on record, proved that the purchase to the extent of Rs. 1,99,74,893/- is not from genuineness sources and it may be a situation that the assessee may have acquired the goods from other parties and have accounted the purchase in the name of M/s Vinayak Enterprises. That the party M/s. Vinayak Enterprise is nothing but mere entry provider of such kind of bogus bills without actual delivery of goods. The Bench also noted that Id. AO has called for the bank statement of M/s Vinayak Enterprises wherein he has established that the money received from the assessee either on the same day or in next day withdrawn through self cheques. Therefore, the contentions of the assessee that this purchase is genuine cannot be accepted of face of it.

11. The Id. AR of the assessee did not controvert the various finding of Id. AO recorded in his order on merits but he has raised various technical issues that such as service of notice and cross examination

of the parties whose statement are relied upon. Therefore, based on the detailed finding of the Id. AO, we do not find force that these purchases are genuine purchases. However, at the same time, the argument of the Id. AR of the assessee that the relevant pursuant these purchases there is sale which is not doubted. The book results were also not rejected by invoking the specific provision of section 145(3) of the Act. Therefore, now, the question arise that what is the amount of income that the assessee earned on account of booking inflated purchase out of this bogus purchase. At the same time, we are of the considered view that the whole amount cannot be added as income of the assessee in the year under consideration. Now the question arises as to how much income is to be imputed on these bogus purchases accounted by the assessee. Recently, the Hon'ble Jurisdictional High Court in the case of Clarity Gold (P) Ltd in ITA No. 125/2014 where in the court has held that:

6. Taking into account the evidence on record, the tribunal while considering the matter has totally deleted the amount of addition. In our considered opinion taking into account the industry which is running the business, the addition which has been made on the basis of GP which has been shown of the identical industry whose is also heard together. The GP rate of previous years reads as under:

A.Y.	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2009-10 unaudite	2010-11
Sales	198490	1426903	5466428	6874979 4	977775 86	10306287	1072033	1540384
Stock Dif.	144657	5147868	0	7145057 3	676926 7	83951400	83334242	5750095
Total	2129557	1941690	5466428	7589485 1	105451 0	11145801	11553681	2115394
Purchases	181023	1698878	4962283	6867023 5	937668 2	96584379	99103051	1574824
Direct Cost	0	6118276	9962436	1409772	131209 2	8607118	10319346	8163403
Total	181023	1760061	5061907	7008000 7	950789 1	97445091	10013498	1956458
Grow	3193228	1816292	4045206	5514844	946618 5	14012920	15401828	1589358
G. P. rate	16.08%	12.72%	7.40%	8.45%	9.68%	13.59%	14.36%	10.31%

Taking into account the average GP rate which will be applied in the present case will be 12 per cent. It is made clear that where ever the profit is more than 12 per cent, the same will not be refunded to the assessee but where it is less than 12 per cent, the income will be assessed on the basis of 12 per cent GP.

12. Recently in [2022] 136 taxmann.com 345 (Mumbai - Trib.) Deputy Commissioner of Income-tax v DBM Geotechnics and Construction (P.) Ltd. has upheld the income embedded at the rate of 12.5% in such purchases as income of the purchaser.

13. As we have the guidance available of the jurisdictional High Court directly on the issue and the Id. AR of the assessee in all fairness accepted that ratio of estimation of profit @ 12% subject to the profit that already declared by the assessee be accepted and reduced from such estimate of 12%. The bench noted that in all

fairness the argument of the Id. AR of the assessee cannot be denied and looking to the jurisdictional High Court judgment and fact of these cases, we hold that the Id. AO should estimate the profit @ 12% of bogus purchase of Rs. 1,99,74,893/- and allow the reduction consequently of the gross profit already declared by the assessee to the extent of these purchases. Based on these observations, the ground No. 5 to 12 are partly allowed.

14. As we have decided the appeal of the assessee on facts of the case the legal ground taken in Ground Nos. 1 to 5 becomes educative in nature and does not require for adjudication Ground Nos. 13 & 14 & 15 are either consequential or general in nature and therefore, the same are also not required to be adjudicated.

In the result, appeal of the assessee is partly allowed.

Order pronounced under rule 34(4) of the Income Tax Appellate Tribunal Rules, 1963, by placing the details on the notice board.

Sd/-
(Dr. S. Seethalakshmi)
Judicial Member

Sd/-
(Rathod Kamlesh Jayantbhai)
Accountant Member

Dated : 02/08/2023

**Ganesh Kumar, PS*

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR
6. Guard File

Assistant Registrar
Jodhpur Bench