

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C', NEW DELHI**

Before Sh. C. M. Garg, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 6893/Del/2019 : Asstt. Year : 2012-13

ITA No. 6894/Del/2019 : Asstt. Year : 2013-14

ITA No. 6895/Del/2019 : Asstt. Year : 2014-15

ITA No. 6896/Del/2019 : Asstt. Year : 2015-16

ITA No. 6897/Del/2019 : Asstt. Year : 2016-17

M/s Kumar Brothers Co., 615, Hemjunt Tower, 98, Nehru Place, New Delhi-110019	Vs	ACIT, Central Circle-26, New Delhi-110001
(APPELLANT)		(RESPONDENT)
PAN No. AAAFK2691R		

ITA No. 7896/Del/2019 : Asstt. Year : 2012-13

ITA No. 7897/Del/2019 : Asstt. Year : 2013-14

ITA No. 7898/Del/2019 : Asstt. Year : 2014-15

ITA No. 7899/Del/2019 : Asstt. Year : 2015-16

ITA No. 7900/Del/2019 : Asstt. Year : 2016-17

ACIT, Central Circle-26, New Delhi-110001	Vs	M/s Kumar Brothers Co., 615, Hemjunt Tower, 98, Nehru Place, New Delhi-110019
(APPELLANT)		(RESPONDENT)
PAN No. AAAFK2691R		

Assessee by : Ms. Mansi Jain, CA &

Sh. Pranshu Singhal, CA

Revenue by : Mr. Waseem Arshad, CIT-DR

Date of Hearing: 25.09.2023	Date of Pronouncement: 20.10.2023
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee and the Revenue against the orders of Id. CIT(A)-5, New Delhi dated 30.07.2019.

2. The issue involved in ITA Nos. 6893 to 6897/Del/2019, are similar, they were heard together and being adjudicated by a common order. In ITA No. 6893/Del/2019, following grounds have been raised by the assessee:

"1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad both in the eye of law and on facts.

2. On the facts and circumstances of the case. Id. CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the proceedings initiated under Section 153C against the appellant and the assessment framed under Section 153C/143(3) are in violation of the statutory conditions of the Act and the procedure prescribed under the law and as such the same is bad in the eye of law and liable to be quashed.

3. On the facts and circumstances of the case, the proceedings initiated under Section 153C are bad in law in the absence of any incriminating material belonging to the assessee being found during the course of the search.

4. On the facts and circumstances of the case, Id. CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the proceedings initiated under Section 153C and the assessment framed under Section 153C is bad and liable to be quashed in the absence of a proper satisfaction being recorded by the AO of the searched person that the incriminating material belonging to the assessee was found during the course of the search.

5. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in confirming the action of the A.O. in holding that the purchases made by the assessee from certain entities are bogus.

6. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in confirming the addition to the extent of an amount of Rs. 2.14.73.050/-on account of bogus purchases.

7. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in confirming the above addition despite the fact that the

documents on the basis of which addition has been made do not belong to the assessee.

8. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in ignoring the fact that there being a complete tally of the quantity purchased and sold the allegation that the assessee has made bogus purchases cannot be sustained.

9. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in confirming the said addition arbitrarily rejecting the material and evidences brought on record by the assessee to show that the purchases were made in regular course of the business and material so purchased was sold in the regular course of business

10. On the facts and circumstances of the case, Id. CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that no adverse inference can be drawn against the assessee on the basis of material collected at the back of it, without giving it an opportunity to rebut the same, in violation of principle of natural justice.

11. On the facts and circumstances of the case. learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the addition is untenable in the eye of law having been made without providing opportunity to cross examine the person on the basis of whose statement the allegations have been made against the assessee and without following the principle of natural justice.

12. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in confirming the addition of an amount of Rs. 17,17,844/- on account of commission @2%, without there being any basis for the same."

3. The issue involved in ITA Nos. 7896 to 7900/Del/2019, are similar, they were heard together and being adjudicated by a common order. In ITA No. 7896/Del/2019, following grounds have been raised by the Revenue:

"1. On the facts and in the circumstances of the case, the Id.CIT(A) has erred in law and on facts in restricting the addition at Rs. 2,14,73,050 /- as against the addition of Rs. 8,58,92,200/- made in the assessment order on

account of bogus purchase without considering the fact that these documents were intended for the purpose of reconciliation of the figures of accommodation entries only as there were no documents for supporting the transactions mentioned in tally documents. The manual resister also did not support the documents maintained in tally.

2. On the facts and in the circumstances of the case, the Id.CIT (A) has erred in law and on facts in restricting the addition to the tune of 25% without considering the fact that the purchase amounts are nothing but bogus purchase entries taken by the appellant from the Jain Brothers. These are taken through the intermediary Suni Kumar jain, CA and which are passed on to them through the shell companies of the Jain Brothers.

4. Facts taken from the order of the Id. CIT(A) and the record are as under:

5. During the course of search operation carried out at the residential premises of Sh. Kaushal Kumar, employee of Sh. Anand Kumar Jain and Sh. Naresh Kumar Jain (Jain Brothers), H. No. 151, Pocket-13, Sector-20, Rohini, Delhi, a document annexurized as Party No. Alpha-6A, Annexure No.-13, Tally data (Hard Disk), Ledger Name: 41 (page no. 1 to 13) were found and seized.

6. On the basis of said document, after recording the satisfaction, seized material and the satisfaction note were handed over to the Assessing Officer. On being satisfied that the document relates to the appellant, notice under section 153C was issued on 28.03.2018. In compliance, the appellant filed return of income on 11.05.2018, declaring an income of Rs. 99,36,430/ on the basis of income assessed under section 143(3) of the Act.

7. On analysis of the document found, the A.O. observed that the page contains a list of companies managed by the Jain

Brothers. The documents found during the search/ and obtained during post search also corroborates that these companies are controlled by Jain Brothers and all the concerns are Paper/shell concerns. Further, a survey u/s 133A of the Act was also conducted on 09.06.2016 at the office and factory premises of the appellant No. 615, 603A, Hemkunt Tower 98, Nehru Place, New Delhi. Annexure A-7 (Page no. 1-110) and Annexure A-8 (Page no. 1-146) were impounded during the course of survey. These annexures contain ledger accounts, purchase invoices of books of accounts and details of transfer of funds by the appellant through RTGS to the shell companies of Jain Brothers through whom the assessee has taken accommodation entries.

8. During the course of survey proceedings, the Revenue held that on analysis of facts and circumstances emerging from the survey, tangible conclusions were arrived that the books of accounts of the assessee were not being maintained as per the accounting standards, the audit of the appellant is incorrect and fabricated, and is 'manufactured' to keep the true accounts from emerging and the appellant is taking accommodation entries for bogus purchases to evade the taxes though the appellant had produced a number of evidences to prove the genuineness of purchases. The Revenue held that they are in possession of concrete evidences in the form of documents found during the course of search at the premises of Jain Brothers, which prove that the appellant has taken accommodation entries in the form of bogus purchase bills during the year under consideration. Therefore, an addition of Rs. 8,58,92,200/- was made on account of purchases by the assessee from the 14 entities managed by Jain Brothers holding the same to be bogus accommodation entries in lieu of cash. Further, an addition of Rs. 17,17,844/- was also made on

account of unaccounted commission paid in cash in relation to said entries.

9. Aggrieved with the addition, the assessee filed appeal before the Id. CIT(A).

10. The gist of the appellant's arguments in respect of these purchases is that while casting doubt on the purchases, no doubt has been casted on the sales shown by the appellant. The appellant has submitted purchase bills and also a detailed explanation with regard to the freight expenses. Details of expenses like packing material, testing charges, air sea freight, washing and pressing, postage, courier, telephone, establishment, repair, maintenance, wages, printing, stationery, insurance, cartage, dyeing, printing, consumable stores, fabrication charges etc., which are all incidental to purchase were filed and no inaccuracy was pointed out by the A.O. Date wise chart of stock of items produced and sold by the appellant during the year under consideration was also produced. Copies of invoices, confirmation of the parties together with the bank statement witnessing the outflow of funds was also produced. The export sales was substantiated by producing copies of export bills, Bills of exchange and airway bills etc. In view of all these evidences it was contended that the purchase are not bogus.

11. The Id. CIT(A) held that though the appellant had produced a number of evidences to prove the genuineness of purchases however, the department is in possession of concrete evidences in the form of documents found during the course of search at the premises of Jain Brothers, which prove that the appellant has taken accommodation entries in the form of bogus purchase bills during the year under consideration.

12. Before the Id. CIT(A), the appellant has also argued that if the effect of purchases of Rs. 8,58,92,200/- treated as bogus is removed, the gross profit rate of the appellant firm would rise from 7.8% to 35%, which is very unlikely to occur considering the industry norms. It was further submitted by the appellant that in the earlier years the gross profit rate of the appellant firm ranged from 7 to 9%. Reliance was placed on the judgment of Bombay High Court in the case of Nikunj Exim Enterprises Pvt. Ltd (2015) 372 ITR 619 (Bom), whereby it was held that as sales have not been doubted and books have not been rejected, the disallowance of purchases should not be made. In the alternative, relying on the judgment of Gujarat High Court in the case of CIT vs. Simit P. Sheth, ITA no. 553 of 2012, dt. 16.01.2013, it was argued before the Id. CIT(A) that only the profit portion embedded in sales against the bogus purchases should be brought to tax.

13. It was further argued that the Hon'ble Apex Court in the case of Vijay Proteins Ltd. Vs. CIT Special Leave Petition (C) Nos. 8956/2015 dated 06.04.2015 was dismissed, the SLP of the appellant was against the order of the Gujarat High Court wherein 25% of the purchases were disallowed on the ground that the expenditure was inflated through fictitious invoices in the names of 33 bogussuppliers. In the said order as well, the Hon'ble High Court confirming the order of tribunal disallowed 25% of the purchase price instead of making addition of 100% of the purchases. Placing reliance on the aforesaid decision of Apex Court, it was submitted that various courts and tribunals have restricted the disallowance of purchases as against the practice of making complete disallowance of purchases, in the following cases:-

- *CIT, Jaipur (Raj) Vs M/S Carpet Mahal in ITA No. 170 / 2009 dated May 10, 2017*
- *CIT, Jaipur (Raj.) Vs Gems Paradise in ITA No. 201/2010 dated November 2, 2016*
- *M/s Stromag Engineers Ltd. Vs. DCIT in ITA No. 5333/Mum/2017 dated 16.01.2019*
- *ACIT vs. Shri Akshay Rajesh Samdariya and Vice Versa in ITA no. 2076/PUN/2016, C.O. No. 58/PUN/2018 dated 31.12.2018*
- *Shri Moolchand H. Seth Vs ITO in ITA No. 2320/Mum/2018 dated 20.12.2018*
- *ACIT, Vs Karam Chand Rubber Industries (P) Ltd. in ITA No.6599/Del/2014 dated 12.12.2018*
- *Dharmesh P. Bhatt Vs ACIT-32 (1), Mumbai in ITA No.2182/Mum/2017, ITA No.2841/Mum/2018, S.A. No.494/Mum/2018, S.A. No.495/Mum/2018 dated 11.12.2018*
- *M/s. Morakhia Metal And Alloys P. Ltd. Vs DCIT (OSD) -1, Cir. 4, Ahmedabad in No. ITA No.667/Ahd/2016 dated 11.12.2018*
- *PCIT Vs M/s Mangalam Infra Development Pvt. Ltd. in ITA No.751 Of 2016 dated 10.12.2018*
- *M/s Amar Timber & Plywood Vs ITO, Ward No. 27 (1) (1), in ITA No. 1113/Mum/2018 dated 7.12.2018*
- *DCIT, Mumbai Vs Toshvin Analytical Private Limited in I.T.A. No.4253/Mum/2017 And I.T.A. No.4222/Mum/2017 dated 16.11.201*

The Hon'ble Gujarat High Court reported as N.K. Industries Ltd. vs. DCIT 2016(6) TMI 1139, dt. 20.06.2016, Id. AR submitted as under:-

"Firstly, the Supreme Court had merely declined to admit the SLP and hence the decision of Supreme Court is not an observation on the merits of the case. The precedence value remains that of Gujarat High Court only.

Even Gujarat High Court, after the date of N.K. Industries has rendered many judgements whereby a portion of bogus purchases only are directed to be added:

- *Pr. CIT vs. Juned B. Memon 2018(5) TMI 1169- 25.04.2018*
- *Pr. CIT vs. Om Shree Nagraj Ginning factory- 27.11.2017, 2017 (12) TMI 812*

- *Pr. CIT vs. Purnima Sunil Agarwal 2017(10) TMI 730- 19.09.2017*
- *Pr. CIT vs. Jagdish H Patel 2017(8) TMI 194- 01.08.2017, relying on Sanjay Oil Cake, 316 ITR 274 (Guj).*

Most importantly, there are cases rendered by other High Court on the same issue:

- *Nikunj Eximo Enterprises Pvt. Ltd. [2015] 372 ITR 619 (Bom) dt. 17.12.2012*
- *PCIT Vs M/s Mangalam Infra Development Pvt. Ltd. in ITA No.751 Of 2016 dated 10.12.2018*

In view of the judgement in the case of CIT vs. Vegetable Products (1973) 88 ITR 192(SC), in case of divergent views of different non jurisdictional High Courts/ one which favors the assessee is to be applied.

14. The Id. CIT(A) after considering the alternative arguments of the assessee the Id. CIT(A) held that the rationale is that no sales is possible without actual purchases. Further, no discrepancy in the details of stock filed by the appellant was pointed out by the AO. The Id. CIT(A) held that from the facts of the case, it appears that the appellant has made purchases from the grey market, which might have given some other indirect savings. In such circumstances only addition of profit embedded in the sales made out of these bogus purchases will meet the ends of justice. Holding thus, the Id. CIT(A) restricted the disallowance to 25% of the 25% of such purchases i.e. 2,14,73,050/- (25% of 8,58,92,200), thereby, according the appellant a relief of Rs. 6,44,19,150/- (8,58,92,200-2,14,73050).

15. Aggrieved with the order of the Id. CIT(A) giving relief of 75%, the Revenue filed appeal and the assessee filed appeal against confirming 25% of the alleged purchases before the Tribunal.

16. Before us, the Id. AR relied on the arguments taken up before the Id. CIT(A) and further argued that since the sales have not been questioned, the assessee was involved in 100% export of the goods manufactured out of the purchases made and argued that had there not been any purchases there could not have been any sales. The Id. AR reiterated that if the purchases are disallowed, the profit would have gone to 35% which is a sky rocketing figure against the normal profits earned by the assessee of 7.15% to 8.73% over a period of 4 years.

17. The Id. DR argued eloquently at length. The arguments of the Id. DR are as under:

"Profit rate earlier yours, accepted or scrutinized cannot be accepted, since material as enumerated vide AO - pages 5-23, exists that impeaches the disclosure made earlier and exports the falsity of particulars field in earlier yours by the assessee.

3 Material with the AO

(a) In this connection, as already recorded in satisfaction note, it is reiterated that during the course of search in the case of Sh. Anand Jain, Sh. Naresh Jain and their shell companies and at residential premise of the Accountant of Sh. Anand Jain and Sh. Naresh Jain at 151, Pocket No. 13, Sector-20, Rohini, Delhi, Annexure -13 which is a Tally Data (Hard Disk) ledger name - 41, page No. 1 to 13 were found and seized.

(b) This ledger 41 is the code of Sh. S.K. Jain CA, a mediator of your firm i.e. M/s. Kumar Brothers Co. among others and Jain Brothers for the purposes of arranging accommodation entries to the beneficiaries.

(c) This ledger - 41 contains the details or all transactions of all shell companies of Jain Brothers in respect of accommodation

entries work done by them through S.K. Jain, the said mediator. Various financial transactions made by your firm with the shell companies of Jain Brothers during different years are discussed as under:

(d) ITAT has adjudicated the case of Naresh Jain and Anand Jain wherein the finding of ITAT- Delhi - is as accommodation entry providers the shell entities are the same as mentioned in AO pages 7 -14.

(e) AO page - 3 Cash - Returned Back in Lieu of Cheques "Example 1: The Jain brothers have paid Cash amounting to Rs. 2,42,24,900/- to M/s Kumar Brothers through mediator S.K. Jain (code name:-41) on 03.02.2014. These amounts were received by the Jain Brothers from M/s Kumar Brothers in their various shell companies banks accounts."

(f) the companies as mentioned by the assessee in its paper book APB 410-413 FROM WHOM PURCHASES EFFECTED are the same as evident from ledger 41 as sheel companies and atleast karda traders and JKS impex are pending for adjudication by the ITAT AS ACCOMODATION ENTRY PROVIDERS vide para 5.1 (II) page 7 of AO. This computer, contained a folder named "Jain" in which the records of such entry transactions had been maintained in tally software companies No. 1 to 53 thereafter, page 21 companies no. -1 to 65.

(g) Para 5.1 (III) Page 11 AO - Bank accounts of these shell companies controlled and operated by Jain Brothers. The post search perusal of the documents and electronic data seized from the various premises revealed a number of bank statements and signed & unsigned cheque books. All these bank documents pertained to the shell companies of the Jain Brothers. Accordingly, information was called in respect of the bank accounts from various banks and branches which were identified from the seized materials. From the perusal of the details collected from the banks, it was found that

most of these accounts were managed and controlled by Shri Anand Kumar Jain or Shri Naresh kumar Jain.

(h) It was seen that the I.P. Addresses of the computer systems, representing most of the online transactions carried out by the different shell companies/concerns, which were used to effectuate these transactions, were similar to the I.P. Addresses of the computers used by the Jain Brothers during analogous date and time frames.

(i) The documents such as correspondence relating to statutory compliances, bank statements, balance sheets etc., of the following companies were found at 914 D Mall, Netaji Subhash Place, Pitampura, Delhi-34, the main office of the Jain Brothers.

(j) However, the payments made did not match with the figures shown for purchases. No corresponding documents (such as journals, correspondences, bility, challans, transporation evidences etc.) relating to the purchase or payments were produced by your during survey proceedings.

(k) Assessee's paper book - 414 - 432 all the banks accounts of XIII companies .. provided -.. of M/s Ceram Sales Pvt. Ltd., to Zen Index Pvt. Ltd.

- No Corresponding link to any specific purchase invoice.*
- Credits precede immediate debits.*
- Matching debits and credits.*
- The Amounts of debits and credits in Millions have no possible correlation to purchase invoices in thousands or at the must a few Lakhs*
- Low balances intr-day*

All the attributes of an arrangement and as "shell companies" or accommodation entry providers.

4 NO INDEPENDENT CORROBORATION OF EXPORTS

(i) *ABP 388 No Linkage of freight and carriage payments, entirely in cash to specific purchase invoices receipt of goods or dispatch of goods to job work providers. The assessee claims that it purchases cloth, has it tailored on job work and then exports readymade garments. No independent corroboration of job work vide tds certificates is apparent.*

(ii) *as regards sale of readymade garments, the exports thereof is open to question given the absence of any Bill of the CHA and any Customs Certification of any export document. There is no FIRC Certification as well.*

5 DPB SUBMITTED ON LAW AS REGARDS ESTIMATE

Estimate is a finding of fact.

There is no proposition in law that entire amount of purchases cannot be added.

Cases where addition restricted to gross profit is largely on account of inference that Purchases have been made from unaccounted sources. However in this case Purchases have been held to be bogus and mere accommodation entries.

Further the Delhi high court in modistone and La medica holds that factum of sales is immaterial if purchases have not been proven."

18. Rebutting the arguments of the Id. DR, the counsel for the assessee submitted her written arguments in writing which are as under:

"1. Delhi High Court 203 taxmann 123, Modistone Ltd.: As per the relevant extract given, easily could be figure out that the said matter involves circumstances when there were no evidences or material given to prove the claim during the year under consideration. Ours is not a case wherein no detail has been given

but a one in which umpteen evidences has been filed including the following:

- a. Confirmations*
- b. Bank statements 'Copy of invoices*
- c. Ledger accounts*
- d. Stock register*
- e. Sales invoices*
- f. ITRs of the various parties.*

Thus the finding of the said case doesn't hold in the case of the assessee.

2. (A, C and G) Kaveri Rice Mills, Allahbad HC 157 taxmann 376 and La Medical DHC and Rishabhdev Tachnocable Ltd.: It is startling that the revenue has taken 3 cases wherein the first two matters, the total purchases has been added while in the third only the addition to the extent of gross profit has been added. Both of the first two said judgments have been relied by the revenue in the matter of Pr. Commissioner of Income Tax-13 Vs. Rishabhdev Tachnocable Ltd., however the Hon'ble Bombay High Court while relying on the judgment in the case of Bholanath Polyfab Limited, has upheld the decision of the Tribunal in making addition to the extent of 5% of the purchases.

Allahabad High Court in Kaveri Rice Mills (157 Taxman 376) held that the addition has to be made to the extent of purchases found to be fictitious. However, this decision of Allahabad High Court was considered by the Hon'ble Bombay High Court in the case of Pr. Commissioner of Income Tax-13, Mumbai Versus Rishabhdev Tachnocable Ltd., [2020] 424 ITR 338 (Bom), dated 10.02.2020, wherein, it has been held as under:

"19. On thorough consideration of the matter, we do not find any error or infirmity in the view taken by the Tribunal. The lower appellate authorities had enhanced the quantum of purchases much beyond that of the Assessing Officer i.e., from Rs.24,18,06,385.00

to Rs.65,65,30,470.00 but having found that the purchases corresponded to sales which were reflected in the returns of the assessee in sales tax proceedings and in addition, were also recorded in the books of accounts with payments made through account payee cheques, the purchases were accepted by the two appellate authorities and following judicial dictum decided to add the profit percentage on such purchases to the income of the assessee. While the CIT (A) had assessed profit at 2% which was added to the income of the assessee, Tribunal made further addition of 3% profit, thereby protecting the interest of the Revenue. We have also considered the two decisions relied upon by learned standing counsel and we find that facts of the present case are clearly distinguishable from the facts of those two cases to warrant application of the legal principles enunciated in the two cited decisions.

20. In Bholanath Polyfab Limited (supra), Gujarat High Court was also confronted with a similar issue. In that case Tribunal was of the opinion that the purchases might have been made from bogus parties but the purchases themselves were not bogus. Considering the fact situation, Tribunal was of the opinion that not the entire amount of purchases but the profit margin embedded in such amount would be subjected to tax. Gujarat High Court upheld the finding of the Tribunal. It was held that whether the purchases were bogus or whether the parties from whom such purchases were allegedly made were bogus was essentially a question of fact. When the Tribunal had concluded that the assessee did make the purchase, as a natural corollary not the entire amount covered by such purchase but the profit element embedded therein would be subject to tax.

21. We are in respectful agreement with the view expressed by the Gujarat High Court."

Delhi High Court in CIT v. La Medical (250 ITR 575) stated that the entire amount is required to be disallowed. However, subsequent to

this various decision have been rendered by Delhi High Court, Bombay High Court and Tribunals in favour of the assessee considering the decision of La Medical. In this regard, reliance is being placed on the following:

In the case of Pr. Commissioner of Income Tax-13, Mumbai Versus Rishabhdev Tachnocable Ltd., Income Tax Appeal (IT) No. 1330 of 2017 dated 10.02.2020, Bombay High Court held as under:

"18. Tribunal noted that it was an admitted fact that the Assessing Officer did not object to the sales made by the assessee. Therefore, it was evident that they were corresponding purchases. Having noted the above, Tribunal examined the books of accounts of the assessee wherefrom it was found that the assessee had made payments on account of the purchases through account payee cheques and the purchases were entered in its books of account. Thus, assessee was able to prove that the purchases were made only in the alternative way. If that be so, then Revenue was only required to estimate the profit at a particular rate. Referring to the figure of 2% arrived by the CIT(A), Tribunal observed that assessee's gross profit varied from 5% to 8.77%. Since the purchases were made from the grey market, the corresponding profit element would be little higher. Therefore, Tribunal directed the Assessing Officer to make further addition of 3% on the bogus purchases and to estimate the income on such basis.

.....

20. In Bholanath Polyfab Limited (supra), Gujarat High Court was also confronted with a similar issue. In that case Tribunal was of the opinion that the purchases might have been made from bogus parties but the purchases themselves were not bogus. Considering the fact situation, Tribunal was of the opinion that not the entire amount of purchases but the profit margin embedded in such amount would be subjected to tax. Gujarat High Court upheld the finding of the Tribunal. It was held that whether the purchases were

bogus or whether the parties from whom such purchases were allegedly made were bogus was essentially a question of fact. When the Tribunal had concluded that the assessee did make the purchase, as a natural corollary not the entire amount covered by such purchase but the profit element embedded therein would be subject to tax.

21. We are in respectful agreement with the view expressed by the Gujarat High Court."

The Judgement of La-Medical has been differentiated by the Honorable ITAT Delhi in the matter of Virendra Kumar Gupta, Prop Sanjay Metal Udyog Versus Acit,Circle 39(1) New Delhi, ITA No. 2721/Del/2016 dated 13.12.2017, it was held as under:

"14.....Further, the decision relied upon by the Id. Departmental Representative of Hon'ble Delhi High Court in case of CIT Vs. La Medica 250 ITR 575 do not apply to the facts of the case as in that particulars case the goods were pledged with the bank and the person from whom the purchases were made and who was operating the bank account was the employee of the group concern of the assessee. However, in the present case there is no such finding similar to that judgment. Further, assessee has already recorded the sales of the goods allegedly purchased from these bogus parties. Further, the Id CIT(A) has categorically stated at page No. 39 of his order under the heading "actual transaction" that goods have actually been purchased from grey market by cash payment from the cash generated outside the books of account and on quantitative details shown by the assessee, it has to be reasonably presumed that assessee purchased material from market in cash and bills were obtained from the above two bogus concerns of the accommodation entry provider. Therefore, it is apparent that the addition of whole of the amount cannot be made. Therefore, in view of the decision of the Hon'ble Supreme Court and Hon'ble High Court cited by the Id DR, we direct the Id Assessing Officer to restrict the addition @25% of the total purchases of Rs.5247565/-

from these tainted parties. Accordingly, the addition is restricted to Rs.1311891/- and balance addition of Rs.3935673/- is deleted. In the result ground No. 4 to 7 are partly allowed."

3. *Point B Your Honour, how the extract reproduced is aiding Id. CIT DR. is out assessee's understanding. As the extract mentions about the facts of the case only and not the decision. In the stated judgment, the issue involved is that of sales which has been made to the government agencies but there were some kachcha bills taken in respect of purchases to suppress the profit earned on sales. It has been held that 3% of the bogus purchases shall be added in the income of the assessee.*

4. *In point D certain parameters have been given, however is not explained in what regard. The cash credits for peak, to no extent are a matter before us and thus the parameters found no grounding as per our analysis.*

5. *Point E COT Vs. Vijay Agricultural Industries, 294 ITR 610 (2007): The said judgment as relied by the Department do not relate to the issue under consideration. It is infact in relation to cash deposits and the usage of peak Credit theory which has nothing common with that of the assessee's circumstances. Further the theory to prove that the credits that emanated from a creditor have been returned to the creditor does not fit into the case of assessee. Where the issue under consideration is purchases.*

6. *Point F Kishan Lai Jewels (P) Ltd., ITA 229/Del/2011 and CO 43/Del/2011: The judgment relied on by the CIT DR is on different footings as that of the assessee and is dealing with addition made u/s 69C, it is infact here to mention that the issue infact has been delivered in favour of the assessee on the ground of purchases being properly examined and proved. It is only few lines which was produced in the order by the Hon'ble Court wherein it was mentioned that,*

"Entire ingenuine purchases can be disallowed and sales can be subjected to tax depending upon the facts and the circumstances of the case. In other cases some reasonable amount may have to be allowed as deduction towards purchases. The present case where purchases were held to be bogus, those could have been disallowed. But that has not been done and alleged sales assessed under section 68 of the IT Act."

Out of this has been extracted "Entire ingenuine purchases can be disallowed and sales can be subjected to tax depending upon the facts and the circumstances of the case. In other cases some reasonable amount may have to be allowed" by the Id. CIT DR that too not verbatim. It is here to mention that the entire purchases would have been disallowed had the sales also been declared bogus. However, the circumstances being different the purchases alone cannot be disallowed completely when the consequent sales are allowed. Thus, this very reason makes it different in circumstances to go for entire addition on account of purchases."

19. Heard the arguments of both the parties and perused the material available on record.

20. We find that the assessee has exported goods and all the invoices reflecting the export of the goods manufactured out of the purchases made were presented revenue authorities. The Id. CIT(A) has accepted that the exports have indeed been completed. There were no dispute on this issue by the Id. CIT(A). The Id. CIT(A) concluded that there have been purchases otherwise there could not have been any production of material, in this case the readymade garments and consequent export. Having held so, the Id. CIT(A) has disallowed 25% of the purchases on the grounds that the assessee could have made some super profits. We have also gone through the various judgments quoted by the Id. CIT(A)

and we are in agreement with the ratio laid down by the Id. CIT(A). With regard to the determination of the embedded profit element we rely on the following judgments in addition to the judgments quoted by the Id. CIT(A):

1. ITA vide 509 & 510/KOL/2017 OM FORGING & ENGG (P) LTD. AYs 2010-11 and 2011-12, the assessee made sales to govt. originations and other reputed organizations and perhaps did not get a chance to suppress sales. As a result, there was necessity for the assessee to introduce purchases its bills to manage its profit to a desired and consistent ratio. The attempt of the assessee failed due to detection of the concerned sales tax authority and communication in the regard by the DGIT(Inv). However, in consequence of the findings of the sales-tax department it may easily be inferred that the assessee made purchases at a limit rate than the rate claimed by it.... As such, the assessee to made a higher profit.

Given the nature of goods,.....They could be purchased in kachha bills.

2. Kishan Lal Jwels (p) Ltd ITA 229/DEL/2011 and co 43/DEL/2011 Para 11: "Entire non genuine purchases can be disallowed and sales can be subjected to Tax depending upon the facts and circumstances of the case. In other cases, some reasonable amount can be added...."

3. PCIT vs. Rishabdev Techno Ltd. in ITA 1330 of 2017 BOM High Court 2010-11, Feb 15 2020

"A.O. has accepted the sales, where purchase were bogus Therefore entire purchases could not be added. Only the

profit element embedded could be added. Purchases vide para 17 and 18 were made to an alternate way.”

21. Further, we have also gone through the recent order of Co-ordinate Bench of ITAT in the case of NKG Infrastructure Ltd. in ITA No. 2501/Del/2022 order dated 27.06.2023 wherein the Co-ordinate Bench after analyzing the judgments of Hon’ble Bombay High Court and Hon’ble Gujarat High Court mentioned above held that *“We find that though the purchases made from Giriraj Global Limited is bogus, the sale made to Anirudh & Raj Builders Pvt. Ltd. is genuine and this fact is not doubted by the Revenue. Hence, it would be just and fair to bring to tax only the profit embedded in the value of such disputed purchases. This profit has been consistently estimated by this Tribunal @ 12.5% on the value of disputed purchases which has been approved by the Hon’ble Bombay High Court and the Hon’ble Gujarat High Court. Hence, we deem it fit and appropriate, in the facts and circumstances of the instant case, to estimate the profit element embedded in the value of disputed purchases at 12.5% of Rs.27,22,028/- instead of 11.69% made by the Id.CIT(A). Accordingly, the grounds raised by the assessee as well as the Revenue on merits are disposed of in the aforesaid manner.”*

22. Keeping in view, the similarity of the specific facts peculiar to the instant case, we hold that justice would be well served if the profit on these purchases is determined at 12.5%.

23. In the result, the appeals of the Revenue are dismissed and the appeals of the assessee are partly allowed.

Order Pronounced in the Open Court on 20/10/2023.

Sd/-

(C. M. Garg)
Judicial Member
Dated: 20/10/2023

Subodh Kumar, Sr. PS

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member