

आयकर अपीलीय अधिकरण "D" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.3019/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2010-11)

Income Tax Officer - 24(1)(4), R. No. 502, C-13, Pratyaksha Kar Bhavan, Bandra-Kurla Complex, Bandra (East), Mumbai - 400 051.	बनाम/ v.	Shri Deepak Khusaldas Mehta, Prop. Mehta Steel Syndicate, 201, Ganga, R.S. Marg, Malad (East) Mumbai -400 097.
स्थायी लेखा सं./PAN : AABPM7200P		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by :	Shri Vishwas Jadhav
Assessee by :	Shri K.P. Kapadia

सुनवाई की तारीख /Date of Hearing : 24-05-2016

घोषणा की तारीख /Date of Pronouncement : 11-08-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue, being ITA No. 3019/Mum/2014, is directed against the appellate order dated 11th February, 2014 passed by learned Commissioner of Income Tax (Appeals)- 34, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2010-11, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 22nd March, 2013 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income Tax Act,1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the Revenue before Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") in the memo of appeal filed with the Tribunal read as under:-

“1. On the facts and in the circumstances of the case and in law, the learned CIT [A] erred in directing the AO to accept the G.P. @3% and deleting the balance addition from the total of Rs. 95,25,636/- made by the AO on account of non-genuine and unproved purchase from the parties declared as "Hawala Operator" by the Sales Tax Department of Maharashtra State.

2. On the facts and in the circumstances of the case and in law, the learned CIT [A] ought to have understood that it is the responsibility of the assessee to prove its purchase and the Ld. CIT(A) should have held that in the absence of that, the entire unsubstantial purchase cannot be allowed as deduction while computing the total income of the assessee.

3. On the facts and in the circumstances of the case and in law, the learned CIT [A] erred in adopting 3% of Rs. 95,25,636/- as the income escaped tax without explaining how she arrived at this 3% as income escaped tax.

4. The appellate prays that the order of the CIT(A) be set aside and matter may be decided according to law. The appellant craves leaves to amend or alter any ground or add a new ground which may be necessary.”

3. The brief facts of the case are that the assessee is engaged in wholesale trading of iron and steel.

During the course of assessment proceedings u/s 143(3) read with Section 143(2) of the Act, it was observed by the AO that the assessee has made purchases of Rs. 6,93,56,301/-. The assessee was called upon to file the details of purchases like TIN, name & addresses of parties from whom the purchases were made. The assessee filed the details along with documentary evidences. Meanwhile, information was received by the AO from Sales Tax

Department, Mumbai which is also available on web-site of Maharashtra Government, Sales Tax Department, Mumbai regarding suspicious dealers who are only providing accommodation entries without doing any actual business. The A.O. observed from the details submitted by the assessee that 20 parties were among the list of bogus parties with whom the assessee had made purchases, the details of which are as under:-

Sr	Name	TIN	PAN	Particulars	
				AY	Amount
01	Negeshwar Enterprises	27030540755V	ANMPP9773E	2010-11	493272
02	National Trading Company	27210561220V	AAGFN0083N	2010-11	662558
03	Shubhlaxmi Sales Corpn	27490615192V	AAVPS1333B	2010-11	401024
04	Bhavani Trade Impex	27520680505V	BBZPS3489Q	2010-11	299853
05	SS Enterprises	27950562074V	ABGFS2578E	2010-11	678912
06	Darshan Sales Corporation	27920382883V	AAGPG7681P	2010-11	310424
07	Siddhi Enterprises	27860154093V	AHUPK6877P	2010-11	886584
08	Amar Enterprise	27030265566V	AIRPB6559J	2010-11	67564
09	Dhruv Sales Corporation	27760622173v	Ahypd6115e	2010-11	399360
10	Riddhihi Siddhi Enterprises	27020601531v	AFIPV6475P	2010-11	262694
11	Samarth Enterprises	27560694451v	APBPS3000G	2010-11	689837
12	Diamond Traders	27550698385V	AJXPG7259F	2010-11	166608
13	Rohit Enterprises	27870215246V	AAIPV81961	2010-11	596268
14	Bright Corporation	27490198480V	AKWPM5913C	2010-11	616871
15	Jaimata Di Trading Co	27480539295V	AHUPK6877A	2010-11	1170801
16	Shradhha Trading Co.	27460624763V	AOTPM8042B	2010-11	246675
17	Gururaj Enterprises	27420603736V	AKYPS7058N	2010-11	513321
18	Leo Impex	27230614753V	AOXPK1621F	2010-11	170914
19	Mahaveer Sales Corporation	27090707756V	AMMPM3778R	2010-11	494816
20	Naveep Trading Corpn.	27540616280V	AAAPV4487A	2010-11	397280
		Total			95,25,636

It was observed by the A.O. that the Sales Tax Department conducted independent enquiries in each of the hawala parties and it was conclusively proved that these parties were engaged in the business of providing

accommodation entries only. The sales Tax Department had provided several documents with respect to nine parties from whom assessee had made purchases and the list of documents are as under:-

- “1. Statement dated 28-03-2010 & Affidavit dated 10-06-2010 of Shri Nitin R Padvekar partner of M/s Nageshwer Enterprises.
2. Statement dated 17-08-2011 & affidavit dated 12-08-2011 of Shri Sanjay Jaysukbal Doshi partner of M/s National Trading Company, M/s Leo Impex, M/s Amar Enterprises and Nageshwar Enterprises.
3. Statement dated 15-07-2011 & Affidavit dated 16-07-2011 of Shri Sanjay Manharlal Solanki Prop Bhavani Trade Impex.
4. Statement & affidavit dated 18-07-2011 of Shir Pravin Meraj Bishoni/Shah Partner of M/s Amar Enterprises, M/s Bright Corpn, M/s Nageshwar Enterprise, M/s Samarth Enterprises and M/ s Shubhlaxmi Sales Corpn.

The copies of the above documents were given to the assessee by the AO whereby it was proved that these 20 parties did not supply any goods to the assessee and the parties issued bills without delivering any goods or services and the payments received by these parties were returned to the assessee in cash after deducting their commission. Notices were sent u/s 133(6) of the Act to all these parties but the same were returned by the postal authorities with the remark that “unclaimed”/”not known”. The assessee was asked to produce the whereabouts of the parties or produce the parties for verification and to prove the genuineness of the purchases. However, the assessee himself submitted the ledger of the parties, which as per the A.O. cannot be relied upon as the assessee neither produced the parties nor provided the new addresses. Thus, the A.O. held that the assessee did not purchase any goods from these 20 parties as mentioned above, and accordingly treated the amount of Rs. 95,25,636/- as unexplained expenditure u/s 69C of the Act

and added the same to the returned income of the assessee vide assessment order dated 22-03-2013 passed by the AO u/s 143(3) of the Act.

4. Aggrieved by the assessment order dated 22-03-2013 passed by the A.O. u/s 143(3) of the Act, the assessee has filed its first appeal before the Id. CIT(A).

5. Before the Id. CIT(A), the assessee submitted that assessee is an individual being a reseller trader in Iron & Steel carrying on the business in name & style of M/s. Mehta Steel Syndicate and carrying on the business on "made to order" basis whereby the assessee procure materials only upon receipt of confirmed sale orders. The assessee submitted that he do not carry any inventory at any given point of time. All the purchases effected by the assessee can be indentified & co-related against sales made by him. The assessee get the order which are normally verbal or in writing or through SMS also. Upon receipt of the order ,he contacts various suppliers either directly or through brokers for procurement of materials for the clients. The goods are directly sent to the customers for which the assessee direct the transporter to pick the material from the suppliers' premises. The assessee was not having any godown. The transporter prepares bills in assessee's name and shifts the material to the customers. The goods are weighed either at the point of origin or in transit for which weighment slips are obtained at approved weigh bridge. This weigh slips form part of delivery documents and ultimately goods are delivered to the customers. The details of the suppliers whereby the Sales Tax department considered them as hawala dealers are as under:-

Sr	Name	amount	remarks	Remarks	Remarks
1	Nageshwar Enterprises	4,93,272/-	Statement filed with Sales Tax Department	Old supplier	
2	National Trading Company	6,62,558/-	Statement filed with Sales Tax	Old supplier	

			Department		
3	Shubhlaxmi Sales Corpn.	4,01,024/-	Statement filed with Sales Tax Department	New supplier	Confirmation already filed during assessment proceedings!.
4	Bhavani Trade Impex	2,99,853/-	Statement filed with Sales Tax Department	New supplier	-
5	SS Enterprises	6,78,912/-		Old supplier	
6	Darshan Sales Corporation	3,10,424/-		New supplier	
7	Siddhi Enterprises	8,86,584/-		New supplier	
8	Amar Enterprises	67,564/-	Statement filed with Sales Tax Department	New supplier	
9	Dhruv Sales Corporation	3,99,360/-		New supplier	Confirmation already filed during assessment proceedings
10	Riddhi Siddhi Enterprises	2,62,694/-		Old supplier	
11	Samarth Enterprises	6,89,837/-	Statement filed with Sales Tax Department	Old supplier	
12	Diamond Traders	16,608/-		New supplier	Confirmation already filed during assessment proceedings
13	Rohit Enterprises	5,96,268/-		New supplier	
14	Bright Corporation	6,16,871/-	Statement filed with Sales Tax Department	Old supplier	
15	Jaimata Di Trading Co	11,70,801/-		Old supplier	Confirmation already filed during assessment proceedings
16	Shardha Trading Co.	2,46,675/-		New supplier	
17	Gururaj Enterprises	5,13,321/-		Old supplier	Confirmation already filed during assessment proceedings

18	Leo Impex	1,70,914/-	Statement filed with Sales Tax Department	Old supplier	
19	Mahaveer Sales Corporation	4,94,816/-		Old supplier	
20	Navneep Trading Corpn	3,97,280/-		New supplier	
		95,25,636/-			

It was further submitted that all the purchases were made through the brokers and the assessee have no direct contacts with the parties. It was submitted that the A.O. relied upon the information received from the Sales Tax Authorities and the website of the Maharashtra Government whereby it was alleged that the twenty parties were engaged in hawala business and did not supply material to the assessee and issued bogus sales invoices. It was submitted by the assessee that the A.O. in his assessment order confirmed that only 9 parties have given statements/affidavits to Sales Tax Department that they were engaged In providing accommodation bills. It was submitted that the A.O. has not examined the parties and had not given opportunity to the assessee to cross examine these parties. Only nine parties had given statement or affidavits to the Sales Tax Departments and total purchases from such parties amounts to Rs. 34,01,893/- as against addition of Rs. 95,25,636/-. It was submitted that the AO has not gathered any material directly but has relied upon the information received from Sales Tax Department and also website of Maharashtra Government. It was submitted that the assessee was never asked to provide the whereabouts of the parties or produce the parties for verification and thereby prove the genuineness of the transactions. It was submitted that while making the addition, the A.O. did not consider the various details filed in the form of quantitative reconciliation and one to one identification of sale and purchases produced by the assessee, and the transport receipts and weighment slips filed before the AO. The payments to these parties were made through cheques. The assessee submitted that the A.O. has erred in making the addition of Rs.

95,25,636/- by treating the entire purchases as bogus although the sale was genuine. The A.O. has not made any enquiry as well did not consider the quantitative reconciliation and the one to one identification of sale and purchase whereby the stock was reconciled. The assessee submitted that the assessee was not given opportunity to produce the parties for necessary examination. It was submitted that all the payments were through cheques and books of accounts were not rejected by the AO and instead entire purchases of Rs.95,25,636/- was added to the income of the assessee. Thus it was submitted by the assessee that the A.O. has not been able to conclusively prove that the purchases made by the assessee were bogus. The details of purchases, sales, gross profit and net profit for the past five years were submitted by the assessee before the learned CIT(A), the details of which are as under:-

Assessment year	Sales	Gross profit	GP ratio	Net profit	Net profit ratio
2010-11	7,34,89,568/-	22,73,639/-	3.09%	5,46,192/-	0.74%
2009-10	6,04,24,903/-	19,46,679/-	3.22%	5,25,046/-	0.87%
2008-09	10,54,65,051/-	29,24,984/-	2.77%	5,22,258/-	0.51%
2007-08	7,29,28,591/-	21,14,467/-	2.90%	4,53,424/-	0.62%
2006-07	7,55,19,447/-	19,02,826/-	2.52%	4,26,624/-	0.56%

The assessee submitted that the purchases were effected only upon receipt of corresponding order for sales and the assessee did not carry any opening and closing inventory and the action of the AO of disallowing the purchases of Rs.95,25,636/- leads to absurd results as under:-

Sr No	Item	Amount	Amount
1	Sale		7,34,89,568/-
2	Purchases	6,93,56,301/-	
	Less: Alleged bogus purchases	(95,25,636/-)	5,98,30,665/-
3	Gross profit		1,36,58,913/-
4	Gross profit ratio		18.57%

In support, the assessee relied upon the following decisions:-

Sr No.	Case	Citation	Authority
1	Commissioner of Income Tax v. Leaders Valves (P) Ltd.	258 ITR 435	High Court of Punjab & Haryana
2	J. R. Solvent Industries (P) Ltd. v. Asstt. Commissioner of Income Tax	68 ITD 65 (TM)	ITAT, Chandigarh Third Member Bench

Without prejudice to the above, the assessee submitted that only nine parties out of twenty alleged hawala dealers had filed affidavit/statement with the Sales Tax Department that they were engaged in providing accommodation bills and the quantum of such purchases from these nine parties amounts to the tune of Rs. 34,01,893/- . If the action of the A.O. to make addition on account of bogus purchases is to be sustained, then it can only be to the extent of Rs. 34,01,893/- on account of alleged bogus purchases from these nine parties with respect to the dealers who have filed the affidavit/statement. The assessee submitted that as per the assessment order, the A.O. had sent notices u/s 133(6) of the Act to twenty dealers who were hawala dealers and the notices were returned undelivered. The assessee submitted that the assessee want to buy peace and do not want to litigate the matter therefore requested to make lumpsum addition on account of alleged bogus purchases by adopting GP ratio on the said bogus purchases. In the support, the assessee relied on the following decisions :-

1. CIT v. leaders Valves Private Limited reported in 258 ITR 435(P & H HC)
2. J.R.Solvent Industries Private Limited v. ACIT 68 ITD 65(TM) , ITAT Chandigarh
3. ITO v. Sunsteel, 92 TTJ 1126, ITAT Ahmadabad Bench
4. Vijay Proteins Ltd. v. ACIT, 58 ITD 428, ITAT Ahmadabad

5. Ramesh verma v. ITO, ITA No. 541/Ahd/2007, ITAT Ahmadabad
6. Shri Simit P. Sheth v. ITO, ITA 3238 & 3293/Ahd/2009, ITAT Ahmadabad Bench.

Thus, it was prayed that the addition may be deleted. The ld. CIT(A) considered the submissions of the assessee and observed that the assessee has claimed that out of 20 parties, 9 parties had given statements/affidavits to Sales Tax Department that they were engaged in providing accommodation bills and rest of the parties had not given statements/affidavits. The learned CIT(A) observed that in the absence of any affidavits/statements, the assessee seems to be under the impression that rest of the amount could be treated as genuine. The onus is on the assessee to bring the evidences on record to prove genuineness of the purchases. The A.O. asked the assessee to get the parties verified, which was not done by the assessee. Thus, the ld. CIT(A) held that since the A.O. also had accepted the sales corresponding to the bogus purchases introduced, A.O. was directed to accept the GP @ 3% as the income had escaped tax and learned CIT(A) ordered deletion of the balance amount, vide appellate order dated 11.02.2014.

6. Aggrieved by the appellate order dated 11.02.2014 passed by the ld. CIT(A), the Revenue is in appeal before the Tribunal.

7. The ld. D.R. relied upon the orders of the A.O. and submitted that notices were issued u/s 133(6) of the Act to the 20 parties from whom the bogus purchases were made by the assessee aggregating to Rs.95,25,636/- which could not be served on these parties as these parties were not available at their given addresses. Information was received from Sales Tax Department that these twenty parties are indulging in bogus accommodation entries and nine out of these twenty parties have given affidavit/statement before the Sales Tax Authorities that the purchase bills provided by them are bogus and merely accommodation entries whereby cash was given to the assessee back

after retaining their commission. The copies of their affidavit/statement was duly furnished to the assessee. No details were provided by the assessee with respect to these parties new addresses nor these parties were produced by the assessee before the AO. Total addition were made for Rs. 95,25,636/- u/s 69C of the Act rightly by the AO which learned CIT(A) erroneously reduced the same by applying GP ratio of 3% as per appellate orders dated 11.02.2014 . The onus is on the assessee to prove the genuineness of the purchases by providing cogent evidences and material to substantiate its contentions as the said amount is duly reflected in books of accounts of the assessee. He relied upon the decision of Hon'ble Allahabad High Court in the case of Sri Ganesh Rice Mills v. CIT (2007) 294 ITR 316 (All. HC).

8. On the other hand, the ld. Counsel for the assessee submitted that the assessee has made purchases from these 20 parties against which proper quantitative reconciliation of sale and purchase was made whereby stock was duly reconciled. Complete details of the purchases were furnished before the A.O. whereby quantitative reconciliation of sales and corresponding purchases were also submitted to reconcile stock. The revenue has accepted sales as genuine but doubted purchases. The ld. Counsel submitted that in the earlier years, the department has accepted the assessee's books of account and GP ratio. GP ratio of five years were produced before the authorities below and GP ratio of the current year under appeal is in line with GP ratio of earlier years. Movement of goods was also not in dispute with the Revenue. Payments have been made by cheques for said purchases. These details were submitted before the A.O. as well as the ld. CIT(A). The A.O. has not made any enquiry as to verify genuineness of purchases. It is the contention of the learned counsel for the assessee that no opportunity was given to the assessee to produce the parties before the A.O. . It is submitted that the ld. CIT(A) has accepted the GP ratio @ 3% which is also accepted by the assessee. The assessee reiterated the submissions as made before the

authorities below and relied upon the order of learned CIT(A). The assessee also drew our attentions to the replies and evidences submitted before the authorities below to support its contentions that purchases are genuine which are placed in paper book i.e. purchases were supported by invoices, payments were made by cheque , reconciliation of quantitative stock of sale with purchases to reconcile stock, confirmations from certain parties which are placed in voluminous paper book filed with the Tribunal running into 384 pages.

9. We have considered the rival contentions and also perused the material available on record including the case laws relied on. We have observed that the assessee is a trader in iron and steel. The assessee has made purchases to the tune of Rs.6.94 crores during the previous year relevant to the assessment year. During the course of assessment proceedings, Information was received by the A.O. from the Sales Tax Department that 20 parties with whom the assessee dealt had indulged in accommodation entries for providing bogus bills, and these hawala dealers were engaged in providing accommodation entries by way of bogus purchase bills were also listed in Maharashtra Government- Sales Tax website as bogus dealers. They were hawala dealers engaged in providing bogus purchase bills whereby there is no actual supply of material and as against cheque received by them against bogus bills, cash was returned to the assessee after deducting commission. Out of 20 parties, 9 parties had given affidavit/statement before the Sales Tax Department that they were hawala dealers engaged in providing bogus purchase bills whereby there is no actual supply of material and as against cheque received by them against bogus bills, cash was returned to the assessee after deducting commission. The copies of the said affidavits/statements were duly furnished to the assessee. The A.O. has issued notices u/s 133(6) of the Act to these twenty parties and all the notices were received back unserved. The notices have been returned back by the

postal authorities with the remark "not known". The parties were not available at the given address and are untraceable. The assessee also expressed his inability to supply new addresses of these twenty parties nor was able to produce these parties before the authorities below on being called upon to produce these parties before the Revenue. The assessee submitted that the assessee is not in contact with these parties and the dealings were made through the brokers and the assessee is not aware of the whereabouts of these parties. The primary onus was on the assessee to prove the genuineness of the transactions entered into its books of accounts. However, the assessee duly produced the details of quantitative reconciliation of sales and purchases whereby the stock tallied. The assessee is not maintaining any inventory as it is stated that after receipt of customer orders, the goods were sourced and hence no godown is maintained by the assessee. The books of account were not rejected by the A.O. while the purchases were doubted and addition of Rs.95,25,636/- has been made by the AO to the returned income u/s 69C of the Act. In the preceding year, the Revenue has duly accepted the return of income filed by the assessee and GP ratio declared were accepted and only minor additions were made. We have also observed that the GP ratio is consistent with the preceding year. The Id. CIT(A) restricted the addition to GP ratio of 3% of the bogus purchases and ordered the deletion of the balance amount added by the AO. We are also aware that principles of Res-judicate is not applicable to the income tax proceedings but principles of consistency is to be maintained. In this previous year relevant to the assessment year, the Revenue is in possession of incriminating material against the assessee. The assessee has offered that the lumpsum addition be made as it did not wanted to litigate the matter further and wanted to buy peace of mind. Nine out of twenty parties have already given the statement and the affidavit that they had indulged in hawala bogus accommodation entries whereby cash was returned to the assessee by these parties after deducting their commissions against the cheque paid by the assessee to settle

payment against the bogus purchase bills which were merely accommodation entries arranged by these 20 bogus dealers whereby no actual supply of material took place as per the contentions of the Revenue and as per facts as emerging from the records which remained uncontroverted as the assessee could not bring on record new addresses of these 20 dealers nor could produce these 20 dealers before the Revenue . The assessee has submitted that he is purchasing the material through brokers and he is not aware of the parties who were supplying material to the assessee. It is incumbent upon the assessee to produce the parties before the A.O. in order to establish genuineness of the purchases . Keeping in view the peculiar facts and circumstances of the case as emerging from the records and surrounding circumstances , we are of the considered opinion that end of justice will be met whereby further addition of 5% of the alleged bogus purchases of Rs.95,25,636/- are made to income of the assessee to cover payment of commission in cash by the assessee to these bogus hawala dealers who have provided accommodation entries to the assessee by providing bogus bills whereby cash was returned to the assessee by these 20 dealers after deducting their commission in lieu of cheque given by the assessee which is corroborated by the statement / affidavits of these 9 bogus dealers. We order accordingly.

We would also like to place reliance on the recent decision of the Tribunal pronounced by a division bench consisting of both of us on 25-07-2016 recently wherein under similar circumstances, same view was taken by us in the case of Reliance Cables and Conductors Private Limited v. ITO in ITA no 3311/Mum/2012 for assessment year 2007-08 vide orders dated 25-07-2016, whereby it was held by the Tribunal as under :

“10. We have considered the rival contentions and perused the material placed on record including the Tribunal orders in ITA No. 6457/Mum/2012 &

ITA 6611/Mum/2012 dated 17th February, 2016 in the case of sister concern of the assessee namely M/s Prakash Metals which was also covered by survey action on 12-12-2007. The Tribunal in ITA No. 6457/Mum/2012 & ITA 6611/Mum/2012 dated 17th February, 2016 in assessee company's sister concern namely Prakash Metals decided the case whereby the findings are as under:-

“These are cross appeals by the assessee and Revenue directed against the order of the CIT(Appeals)-31, Mumbai dated 17/08/2012 for assessment year 2007-08.

2. The facts of the case, briefly, are as under:-

2.1 The assessee firm, engaged in the business as manufactures, traders of conductors and ferrous and non-ferrous metals, filed its return for assessment year 2007-08 on 29/10/2007 declaring NIL income. A revised return was filed on 1/9/2008 declaring total income of Rs.5,91,912/-. The return was processed under section 143(1) of the Income Tax Act, 1961 (in short ‘the Act’) and the case was subsequently taken up for scrutiny.

2.2 A survey under section 133A of the Act was conducted in this case by the ADIT (Inv), Unit IV(i), Mumbai on 12/12/2007 on the basis of information/verification of bank data under the Banking Cash Transaction Act that M/s. Shradha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd.and other concern promoted by Shri Pravin Agarwal had indulged in suspicious transactions but admitted that no actual business of sale and purchase was carried

out by them and that these transactions were all accommodation entries in respect of which the assessee and others were beneficiaries. In this survey it was found that in the period relevant to assessment year 2007-08, the assessee had purchased materials worth Rs.2,27,60,254/- from M/s. Shraddha Saburi Merchants Ltd. and Rs.1,55,09,505/- from M/s. Sai Kripa Metallic Tradecom Ltd., for which payments made by the assessee were credited in the aforesaid two parties bank accounts and the same was withdrawn in cash on the very next dates after its deposits; the assessee being the main beneficiary of these activities. The survey action revealed that the assessee had taken accommodation bills showing bogus purchase during the period relevant to assessment year 2006-07 and 2007-08 from M/s. Shraddha Saburi Merchants Ltd., and M/s. Sai Kripa Metallic Tradecom Ltd. The above modus operandi and the fact that the assessee was a beneficiary of such activities was confirmed by Shri Pravin T. Agarwal in a statement filed before ADIT (Inv), Unit IV(i), Mumbai on 2/11/2007. The ADIT (Inv) also reportedly informed the Assessing Officer that the partner of the assessee firm Shri Prakash J. Shah was afforded an opportunity to cross-examine Shri Pravin T. Agarwal, which he did not avail.

2.3 In the light of the above material on record, the Assessing Officer afforded the assessee an opportunity of being heard in the matter to explain the purchase transactions carried out with these parties in the relevant period (supra). In this regard, the statement of Shri Prakash J. Shah, partner of the assessee firm was recorded on 12/12/2007 wherein, inter-alia, he has stated that he is only

acting as an indenting agent wherein the materials purchased by it is directly dispatched through the parties from whom the material was purchased to the customers to whom it is sold i.e. M/s. Rajasthan Aluminium & M/s. D.C.Metals, payments/receipts in this regard being both by way of account payee cheque. Alternatively, it was submitted by the assessee that in case the said purchases from the aforesaid two parties are treated as bogus, then the corresponding sales shown by the assessee should also be considered bogus and the difference between purchases and sales being the G.P, only this amount should be considered as its income. The Assessing Officer did not accept the explanations put forth by the assessee observing that except for making the aforesaid claims, the assessee could not furnish material to prove the mode of delivery of goods purchased/sold, names and addresses and other related particulars and details of the parties to whom goods were allegedly sold, or to explain with documentary evidence the transactions entered into for purchase from the aforesaid two parties.

2.4 The aforesaid submissions of the assessee did not find favour with the Assessing Officer who observed that these averments of the assessee were already dealt with in the course of survey, post survey investigations. The Assessing Officer was of the view that as per the facts on record the transactions entered into by the assessee with M/s. Shradha Saburi Merchants Ltd., M/s. Sai Kripa Metallic Tradecom Ltd. (purchase parties), M/s. Rajasthan Aluminium and M/s. D.C. Metals (sale parties) were only accommodation entries

rendered by Shri Pravin T. Agarwal and accepted by Shri Prakash J. Shah of the assessee firm and not real sale/purchase transactions as presently claimed by the assessee. In this view of the matter, the Assessing Officer at para 10 to 12 of the order of assessment held that since the assessee could not substantiate the purchases made from the aforesaid two concerns, the entire alleged purchases of Rs.3,82,69,759/- shown by the assessee from M/s. Shraddha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd. as bogus and brought the entire amount to tax in the assessee's hands. The assessment was accordingly completed under section 143(3) of the Act vide order dated 31/12/2009 wherein, the income of the assessee was determined at Rs.3,87,89,670/-.

3.1 Aggrieved by the order of assessment for assessment year 2007-08 dated 31/12/2009, the assessee preferred an appeal before the CIT(Appeals)-31, Mumbai. The CIT(Appeals) disposed off the assessee's appeal vide the impugned order dated 17/8/2012 allowing the assessee partial relief. In the course of appellate proceedings, the CIT(Appeals) remanded to the file of the Assessing Officer for enquiries to be made for the purpose of corroborating the Assessing Officer's finding that the entire investment in purchases by the assessee from M/s. Shraddha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd. amounting to Rs.3,82,69,759/- constituted unaccounted income of the assessee. In this context the Assessing Officer was also required to make available to the assessee copies of statements of Shri Pravin T. Agarwal dated

12/12/2007, primarily relied on by the Assessing Officer to make the addition of undisclosed income of Rs.3,82,69,759/- and to afford the assessee opportunity of cross examination of Shri Pravin T. Agarwal. The matter was remanded to the Assessing Officer on more than one occasion to address the rebuttals put forth by the assessee. Report in the matter was also called for from the DDIT (Inv) Unit IV(i), Mumbai.

3.2 After taking into account all the facts before him, the CIT(Appeals) observed that the assessee had only facilitated the concerned purchase and sale parties, as an indenting agent for commission, in their transactions of bogus sale and purchases. The CIT(Appeals) observed that no evidence was brought on record by the Assessing Officer /DDIT to establish that the assessee purchased the goods from third parties in cash, as all the transactions of the assessee with both the concerned sale and purchase parties was admittedly through banking channels. In this view of the matter, the CIT(Appeals) held that the Assessing Officer was not justified in holding that the entire purchases by the assessee are its undisclosed income and that the corresponding sales only are genuine; particularly when the quantity purchased and sold are identical. The CIT(Appeals) was of the view that the assessee facilitated these bogus transactions for the pecuniary benefit of commission. The CIT(Appeals) was of the view that since the entire transaction was clandestine, the assessee would have earned more than the 0.17% commission declared by it; (which was the difference between the

concerned sales and purchase transactions) or which is normally declared in this business at 1 to 2% according to the assessee. Following the ratio of the decision of the ITAT, Ahmedabad bench, in the case of *Vijay Proteins Ltd.* (15 ITD 428), the CIT(Appeals) estimated the commission earned by the assessee at 5% of the said purchase of Rs.3,82,69,759/- in the peculiar facts and circumstances of the case on hand.

4. Aggrieved by the order of the CIT(Appeals) -31, Mumbai dated 17/8/2012 for assessment year 2007-08, both Revenue and the assessee have preferred appeals before the Tribunal in respect of the issues held against them.

4.1.1 The grounds raised in the assessee's appeal are as under:-

I 1. The Commissioner of Income Tax ("CIT(A)") erred in making confirming addition of Rs. 18,48,429/-, being estimating the additional commission income on the accommodation bills of bogus purchases made from M/s. Sai Kripa Metallic Tradecom Pvt. Ltd., and M/s Shardhha Saburi Merchants Ltd @ 5% of the total purchase amount from the above two parties, after deducting the net commission income of Rs. 65,0591- shown in the books of account.

2. The learned CIT(A) was already satisfied and has verified all the purchases and sales bills with the net income out of these transactions which were fully supported by the account payee cheques and was accepted that no cash transactions were involved.

3. The transactions proved the *modus operandi* of direct purchases and sales by the parties where your appellant was only delcredere agent supported by various documentary confirmations under the circumstances.

4. The learned CIT(A) failed to appreciate that the Appellant had acted as an indenting agent and accordingly, earned the commission income as shown in the form of profit which is in the nature of commission and shown in the Profit & Loss Account. Hence no addition is called for.

3. The appellant prays that the addition of Rs.18,48,429/- be deleted as unwarranted and unjustified.

4. Without prejudice to the above the appellant prays that the addition be reduced to reasonable appropriate rate depending upon the circumstances of the Appellant's case.

II. 1. The appellant craves leave to add to , amend and/or alter the above grounds of appeal.”

4.1.2 At the outset, the Ld. Representative for the assessee for the assessee submitted that in its appeal, the assessee will be pressing only Ground No.I (supra) and that all other grounds I (2 to 4) and (2 to 4) as well as II(1) are not being pressed. Since the grounds at S.Nos.I (2 to 4) and (2 to4) and II(1) are not pressed in this appeal, the same are rendered infructuous and accordingly dismissed.

4.2 The grounds raised in Revenue's appeal are as under:-

1. “ The Learned CIT(A) has erred on facts and circumstances of the case and in law in directing AO to delete Rs. 3,64,21,330/- held as bogus purchases by the Assessing Officer.
2. The Learned CIT(A) has erred on the facts and circumstances of the case and in law in assuming the assessee as merely an agent receiving prefixed commission in respect of the transaction of alleged bogus purchases.
3. The appellant prays that the order of the CIT (Appeals) on the above grounds be set aside and that of the AO be restored.
4. 4. The appellant craves leave to amend or alter any ground or to submit additional new ground which may be necessary.”

5.1 In Ground No.1 of Assessee's appeal, it is contended that the CIT(Appeals) erred in estimating the commission income earned by the assessee on accommodation bills of bogus purchases made from M/s. Shraddha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd. @5% of the total purchases of Rs.3,82,69,759/- from these two parties.

5.2 In Grounds No.1 to 4 of Revenue's appeal, it is contended that CIT(Appeals) erred in directing the Assessing Officer to delete the addition of Rs.3,82,89,579/- held by the Assessing Officer as income of the

assessee arising out of bogus purchases from the aforesaid two parties and in assuming that the assessee has merely earned commission in respect of the aforesaid purchases.

5.3 The assessee's Grounds I(1) and Revenue's Grounds (1 to 4)(supra) being both in respect of the contrary findings of the Assessing Officer and the CIT(Appeals) on the same issue of determination of the income earned by the assessee from out of the transactions of bogus purchases amounting to Rs.3,82,69,759/- made by the assessee from the two parties M/s. Shraddha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd., these issues being inter connected and arising from the grounds raised by both sides in respect of the same set of transactions, they are being considered and disposed off together hereunder.

5.4.1 The Ld. Representative for the assessee , on the issue raised in Revenue's appeal, vehemently supported the impugned order of the CIT(Appeals) in respect of its finding holding that the Assessing Officer was not justified in holding that the entire purchases of Rs.3,82,69,759/- made by the assessee from the two purchase parties i.e. M/s. Shraddha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd. was the assessee's undisclosed income; particularly when there were immediate and identical quantities sold to M/s.D.C.Metals and M/s. Rajasthan Aluminium through banking channels. It is submitted that the CIT(Appeals) had, after due consideration of the factual material on record, found that the assessee had only facilitated the concerned purchase and sale parties as an indenting agent for remuneration in commission in their transaction of bogus sales and purchases.

5.4.2 *In respect of Ground No.I(1) in the assessee's appeal, the Ld. Representative for the assessee contended that the CIT(Appeals), after observing that the assessee was only an indenting agent or facilitator for the aforesaid sellers and purchasers in their transactions of bogus sales and purchases in return for remuneration of commission, erred in not accepting the commission of 0.17% as admitted by the assessee. It is contended that the estimation of commission income earned by the assessee on the aforesaid transactions as a facilitator @5% thereon was too high and the same could not be more than 1 to 2% thereof in such business.*

5.5.1 *In respect of the grounds raised at S.No. 1 to 4 of Revenue's appeal, the Ld. Departmental Representative placing strong reliance on the findings of the Assessing Officer in the order of assessment, contended that the CIT(Appeals) had erred in holding that the assessee was merely an indenting agent receiving commission in respect of transactions of bogus purchases and in consequently deleting the addition made by the Assessing Officer on account of bogus purchases from the aforesaid two parties; i.e. M/s. Shraddha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd.. It was prayed that the finding in the Assessing Officer's order be restored.*

5.5.2 *In respect of the averments of the Ld. Representative for the assessee on the assessee's grounds claiming that the assessee's income from commission @ 0.17% of purchases should be accepted as such and not at 5% determined by the CIT(Appeals), the Ld. Departmental Representative submitted that, without prejudice to Revenue's stand that the entire bogus purchases amounting to Rs.3,82,69,759/- made by the assessee from the*

aforesaid two parties ought to be brought to tax in the assessee's hands as held by the Assessing Officer, the claim of the Ld. Representative for the assessee is contradictory as before the CIT(Appeals) the claim was that commission in such type of business would be 1 to 2% thereof. In these circumstances, since the averments of the assessee are bereft of any corroborative material evidence, the assessee's appeal ought to be dismissed.

5.6.1 We have heard the rival contentions, in respect of both the assessee's as well as Revenue's cross appeals, and perused and carefully considered the material on record. The facts of the matter, from the assessment to the first appellate proceedings, leading to the present appeal have been briefly narrated at para 2.1 to 3.2 of this order (supra). On a perusal of the impugned order, we find that the CIT(Appeals) has made a detailed consideration of the order of assessment, the averments of the Ld. Representative for the assessee for the assessee, the various remand reports submitted by the Assessing Officer, the assessee's rebuttals, details filed in the report of DDIT(Inv) Unit IV, Mumbai. We also find that, after consideration of all these material on record, the CIT(Appeals) observed that no material evidence was brought on record by the Assessing Officer /DDIT (Inv) to establish that the assessee purchased the goods from third parties in cash, as all the transactions of the assessee with both the sale and purchase parties were through banking channels. The CIT(Appeals) noticed from the material before him, that the assessee had only facilitated the concerned purchase and sale parties in their transactions of bogus sales and purchases as an indenting agent for commission. It was in this factual matrix that the CIT(Appeals) held that

the Assessing Officer was not justified in holding that the entire purchases by the assessee from M/s. Shraddha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd. are the assessee's undisclosed income and that only the corresponding sales to M/s. Rajasthan Aluminium and M/s. D.C Metals are genuine, particularly when the items/quantity purchased and sold are identical.

5.6.2 It is seen that the CIT(Appeals) from the material on record, was of the view that the assessee facilitated these bogus transactions of sale and purchase for the aforesaid sale and purchase parties as an indenting agent and received commission thereon. We find that CIT(Appeals) was of the opinion that since the aforesaid bogus transactions of sales and purchases were clandestinely carried out, the assessee would have certainly earned more than the 0.17% declared by the assessee or 1 to 2% earned in such type of business as admitted by the Ld. Representative for the assessee. The CIT(Appeals) following the ratio of the decision of the ITAT Ahmedabad Bench in Vijay Protein Ltd. (supra) proceeded to estimate the commission earned by the assessee @5% on the said purchase transactions amounting to Rs.3,82,69,759/- in the peculiar facts and circumstances of the case.

5.6.3 The findings of the ld. CIT(A) at paras 2.4 to 2.4.3 of the impugned order, in respect of the issues before us is extracted hereunder :-

“2.4 I have carefully considered the assessment order and the submissions of the AR. I have also gone through the various remand reports and its rebuttals including the various details filed by the AR and the report of DDIT(Inv)Unit-V, Mumbai as discussed above. I have also gone through the various statements recorded by the AO during the remand proceedings i.e. statements of Shri Prakash J. Shah dated 21.07.2011 and statements of Shri Raju Bhansali & Shri Chanduprakash Bhansali dated 19.07.2011 and the affidavit of Shri Prakash J.

Shah dated 06.01.2012 as well as the affidavits of Shri Raju Bhansali & Shri Chanduprakash Bhansali dated 14.05.2010 and the affidavit of Shri Pravin T. Agarwal dated 19.05.2010 as discussed above. Besides, I have also gone through the statement of Shri Prakash J. Shah partner of the appellant firm recorded during the course of survey u/s 133A of the Act as well as the statement of Shri Pravin T. Agarwal recorded u/s 131 of the Act dated 24.03.2008 and his written confession submitted vide letter dated 02.11.2007 before the ADIT (Inv). On perusal thereof I find the appellant has shown purchases of aluminium and copper rods of Rs.3,82,69,759/- from M/s Shradha Saburi Merchants Ltd and M/s Sai Kripa Metallic Tradecom Limited and its corresponding sales to M/s D.C. Metals and M/s Rajasthan Aluminium during the relevant accounting year. However, based on the various enquiries made and evidences gathered in the case of the appellant by the ADIT (Inv.), Unit - IV (1), Mumbai it was found that no such goods were purchased from M/s Shradha Saburi Merchants Ltd and M/s Sai Kripa Metallic Tradecom Ltd inasmuch as these sales bills issued by M/s Shradha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd. were bogus accommodation bills issued without supply of actual material as disclosed therein. Or in other words, the appellant has not made any such purchases from M/s. Shradha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd. and therefore, the entire purchases shown was considered as bogus or unexplained purchases and accordingly the same was added to its total income. However, the appellant has submitted that it is only engaged in the indenting agency business; whereby, the goods purchased were directly dispatched by M/s. Shradha Saburi Merchants Ltd and M/s. Sai Kripa Metallic Tradecom Ltd. to the godowns of M/s. D.C.Metal and M/s. Rajasthan Aluminium without any involvement of the appellant. It was further submitted that the appellant for its indenting agency services was duly compensated by way of commission which is the difference between the sale price and the purchase price as shown in its books of account. At the same time the AR has vehemently argued that neither a copy of the statement recorded of Shri Pravin T. Agarwal as discussed in the assessment order was provided nor the appellant was allowed to cross examine Shri Pravin T. Agarwal either by the AO or by the ADIT. It was vehemently argued that the denial of the cross examination by the appellant of Shri Pravin T. Agarwal as discussed in the assessment order is false and incorrect. Accordingly, the appellant has filed an affidavit dated 19.05.2010 of Shri Pravin T. Agarwal; wherein, he has admitted having made sale of material as per the sale bills issued to the appellant. The AR has also filed corresponding affidavits dated 14.05.2010 of Shri Raju Bhansali partner of M/s Rajasthan Aluminium and Shri Chandra Prakash Bhansali partner of M/s D.C. Metals confirming the contention of the appellant, as discussed above. Therefore, on account of these facts placed on record the matter was remanded to the AO on various occasions as discussed above. The matter was also referred to the concerned DDIT(Inv) for making further enquiries and investigations as discussed above. However, in spite thereof no fruitful or logical details and evidences are brought on record so as to hold that the entire purchases shown by

the appellant from M/s Shraddha Saburi Merchants Ltd and M/s Sai Kripa Metallic Tradecom Ltd are to be considered as its unaccounted or unexplained income. The AO herself vide para-4 of her remand report dated 19.09.2011 has confirmed the submissions of the appellant that the source of payments made to M/s Shraddha Saburi Merchants Ltd and M/s Sai Kripa Metallic Tradecom Ltd through banking channels are originating out of the payments received from M/s D.C. Metal and M/s Rajasthan Aluminum by the appellant. From the same as well as from the details and evidences brought on record it is seen that the appellant has been acting only as a conduit or an agent to facilitate the bogus transactions of purchases and sale of aluminum sheets and copper wires & rods taken place between M/s Shraddha Saburi Merchants Ltd and M/s Sai Kripa Metallic Tradecom Ltd (sale parties) and M/s D.C. Metal and M/s Rajasthan Aluminum (purchase parties) merely as a middleman or an indenting agent; whereby, the appellant has in turn issued bogus or accommodation sale bills in favour of M/s D.C. Metal and M/s Rajasthan Aluminum against the receipt of similar bogus or accommodation sale bills issued by M/s. Shraddha Saburi Merchants Ltd and M/s. Sai Kripa Metallic Tradecom Ltd. Or in other words, it has acted merely as an indenting agent or as a facilitator to legalise such bogus transactions; whereas, the real beneficiaries of these bogus transactions are M/s. D.C. Metal and M/s Rajasthan Aluminum, as no evidences except for the movement of funds no other corresponding or corroborative evidences to establish the actual purchase and sale of goods mentioned in these sale/purchase bills are produced neither by M/s Shraddha Saburi Merchants and M/s Sai Kripa Metallic Tradecom Ltd, nor by the appellant or by M/s D.C. Metal and M/s Rajasthan Aluminium. Nothing is brought on record to prove the movement, transportation as well as the names and particulars of the parties from whom these goods were either purchased M/s Shraddha Saburi Merchants Ltd and M/s Sai Kripa Metallic Tradecom Ltd or by the Appellant or by the M/s D.C. Metal and M/s Rajasthan Aluminum; except for the issue of bogus sales bills by M/s. Shraddha Saburi Merchants Ltd and M/s. Sai Kripa Metallic Tradecom Ltd and by the appellant which as discussed above are already confirmed to be bogus bills without sale of actual material by M/s. Shraddha Saburi Merchants Ltd. and M/s. Kripa Metallic Tradecom Ltd. (statement of Shri Pravin T. Agarwal dated 24.03.2008) and by the appellant (affidavit of Shri Prakash J. Shah dated 06.01.2012). No other evidences are brought on record by the AO or by the DDIT so as to prove that the appellant has purchased these goods from third parties in cash. Nothing is produced to prove that such material purchased is sold to M/s. D.C. Metal and M/s Rajasthan Aluminum by the appellant as no such evidences to prove the movement of goods is either produced by the AO or by the DDIT or by the concerned purchase parties. The AO has not brought any such details and evidences (in remand) even though statements of Sri Prakash J. Shah and Shri Raju Bhansali & Shri Chanduprakash Bhansali were recorded during remand proceedings. It is not proved that the cash withdrawn from the bank accounts of M/s. Shraddha Saburi Merchants Ltd and M/s Sai Kripa Metallic Tradecom Ltd were given to the

appellant. Therefore, it is seen that no such material is sold by the appellant to M/s. D.C. Metals and M/s Rajasthan Aluminum except for the issue of bogus bills in consonance with the movement of funds as discussed above. No material or evidence is produced by the AO or by the DDIT that these goods were procured by the appellant from grey market in cash and thereafter sold to M/s D.C. Metals and M/s Rajasthan Aluminum. On the other hand from the affidavits of the Shri Chandra Prakash Bhansali and Raju Bhansali dated 14.05.2010, the material purchased is directly delivered by the concerned manufacturers or suppliers to their godowns without any involvement of the appellant. It was also stated that these suppliers I manufacturers are having their godowns situated outside Mumbai, Check Naka, where M/s D C Metals and Rajasthan Alluminium are also having their godowns I warehouses. On account of these facts and evidences placed on record, I find sufficient merits in the submissions of the AR that the appellant has only facilitated the concerned purchase and sale parties, being a conduit in the process of legalization of the transaction of bogus purchases and sales against payment of pre-fixed commission. These submissions of the appellant are duly corroborated by the affidavits of Shri Pravin T Agarwal, promoter of M/s. Shraddha Saburi Merchants Ltd and M/s. Sai Kripa Metallic Tradecom Ltd and Shri Chandra Prakash Bansali and Shri Raju Bhansali, partners of M/s. D C Metals and M/s. Rajasthan Alluminium respectively. The AO has confirmed that the funds originating from M/s. D.e. Metals and M/s. Rajasthan Aluminum are immediately transferred to the bank accounts of M/s Shraddha Saburi Merchants Ltd and M/s. Sai Kripa Metallic Tradecom Ltd through the bank accounts of the appellant. Thereafter, the same are withdrawn in cash from the bank accounts of M/s. Shraddha Saburi Merchants Ltd and M/s. Sai Kripa Metallic Tradecom Ltd but ultimately to whom the same is paid is not investigated either by the AO or by the ADIT/DDIT either during the course of the assessment order or during the remand proceedings. Both these authorities as discussed above have failed to examine Shri Pravin T. Agarwal on this issue nor they could succeed in recording the statement of Shri Pravin #T. Agarwal and further to be cross examined by the appellant as discussed above. The AO as well as the DDIT have expressed their in this regard. Similarly, no cross examination of Shri Chandra Prakash Bhansali and Shri Raju Bhansali is granted to the appellant in spite of the contents of their affidavits dated 14.05.2010 as discussed above vis-a-vis their independent statements recorded by the AO during the remand proceedings on 19.07.2011. On account of these facts brought on record, I find sufficient merits in the submissions of the AR that the statements recorded by the AO at the back of the appellant cannot be considered as valid piece of evidence.

2.4.1. Besides, it may be noticed that in spite of granting sufficient opportunity by way of remanding the proceedings to the AO as well as referring the matter to the DDIT (Inv), as discussed above, they have failed to substantiate or corroborate the findings of the AO as discussed in the assessment order by bringing any cogent material so as to establish that the entire purchases shown

by the appellant are its unexplained income. Both the AO and the DDIT(Inv) have failed to record the statement of Shri Pravin T Agarwal and allowing him to be cross-examined by the appellant, so as to ascertain the correct facts of the case in hand. In the absence of such a statement and further corroborative documentary evidences brought on record, to my considered opinion, it is unjustified on the part of the AO to hold that the entire purchases shown by the appellant are to be considered as its unexplained income. It is patently incorrect conclusion on the part of the AO that the purchases are not genuine but at the same time the corresponding sales shown are genuine sales. If the purchases are bogus without proving that the appellant has purchased the same items in grey market in cash it cannot be held that the corresponding sales are genuine. However, nothing is brought on record either by the AO or by the DDIT even though the matter was specifically remanded for this purpose. Therefore, I find sufficient merits in the submissions of the AR that if the purchases are found bogus, the corresponding sales of the same item as shown by the appellant in its books of accounts cannot be considered as genuine sales. Nevertheless, no details of whatsoever nature about the parties from whom, the material is purchased, its movement or transportation to the godown of M/s. D C Metals and M/s. Rajasthan Alluminium is brought on record by the AO or by the DDIT(Inv), in spite of conducting survey u/s 133A of the Act. Further, there is no evidence to prove that the cash withdrawn by Shri Pravin T Agarwal is returned to the appellant and not to M/s. D C Metals or M/s. Rajasthan Alluminium, particularly considering to the contents of the affidavit of Shri Prakash J Shah, partner of the appellant firm dated 06.01.2012. Therefore, it is seen that in spite of remanding the matter on several occasions, no new facts and evidences are brought on record by the AO or by the DDIT(Inv), so as to justify the bogus purchases made by the appellant out of its unaccounted income. On the other hand, as discussed above, the AO herself has admitted on verification of the relevant bank accounts that the source of the entire payments made to M/s Shradha Saburi Merchants Ltd and M/s. Sai Kripa Metallic Tradecom Ltd by the appellant through banking channels is out of the payments received from M/s. D C Metals and M/s. Rajasthan Alluminium. This proves that no unaccounted investment is made by the appellant for this purpose during the relevant accounting year.

2.4.2 Besides, Shri Prakash J Shah in his statement dated 06.01.2012 has stated the detailed modus-operandi of the entire transactions arranged by the appellant, which proves that the appellant has merely rendered or facilitated these two parties i.e. M/s. Shradha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd.(purchase parties) and M/s. D C Metals and M/s. Rajasthan Aluminium (sales Parties) by way of issue of bogus sales bills against pre-fixed commission received. The contents of the affidavit filed are further corroborated by way of the evidences furnished i.e. from the copies of bank account opening forms filed, it is seen that the appellant has opened a new account particularly for this purpose in the same bank and branch (Ratnakar

Bank) in which, the bank accounts of M/s. D C Metals and M/s. Rajasthan Alluminium were maintained and the new account opening form of the appellant is introduced by the director/partner of M/s.D C Metals and M/s Rajasthan Alluminium. Secondly, it is also noticed a the appellant has never dealt in the business of alluminium sheets and rods, which are found mentioned in these accommodation bills issued. Further, the appellant has no facility or warehousing to store the material purchased, which is admitted by the partners of M/s.Rajasthan Alluminium and M/s. D.C. Metals in their affidavits dated 14-05-2012, contending that the material purchased was directly delivered by manufacturers / suppliers in their own delivery vans / handcarts from their godowns situated outside Mumbai Check Naka, where M/s. D.C. Metals/ M/s. Rajasthan Alluminium were also having their godowns /warehousing facilities. Further, it is also noticed that the entire amount of Maharashtra-VAT on these transactions is paid by M/s DC Metals / M/s. Rajasthan Alluminium.

2.4.3. Therefore, on account of these facts available in the case of the appellant, as discussed above and further in the absence of any new facts and evidences brought on record by the AO as well as in the absence of any corroborative evidences placed on record in spite of remanding the matter on various occasions, I find it cannot be held that the entire purchases made by the appellant are out of Its unaccounted sources or the same is to be considered as its unexplained income. Even otherwise, even if the purchases are held as bogus, to my considered opinion, it cannot be held that the corresponding sales are genuine; particularly when the quantity purchased and sold are same. Obviously, in such a circumstance if the purchases are considered the corresponding sales also has to be bogus. Therefore, on account of the same, it is evident that under the given facts and circumstances the appellant has merely issued accommodation sales bills against the payment of pre-fixed commission as discussed above. However, since the entire transaction is carried out in a clandestine manner, it cannot be held that the rate of commission is as per the normal practice followed in this line of business. Naturally, it has to be more than the normal rate of commission paid in this line of business. In the case of Vijay Proteins Ltd vs. ACIT reported in 15 ITD 428, the Hon'ble ITAT Ahmedabad "C" Bench under similar circumstances, where the AO disallowed the entire expenditure on account of purchases made from certain parties trating the same as bogus, has held that "it is an elementary rule of accountancy as well as of taxation laws that profit from business cannot ascertained without deducting cost of purchase from sales/ otherwise It could amount to levy of income tax on gross receipts or on sales. Such recourse is not permissible unless it is specifically authorized to do so under any particular provisions contained in the Act." It has been held by the Hon'ble Tribunal that in such circumstances, a certain percentage of expenditure has to be disallowed on account of inflation of purchase price. The ITAT has held that if purchases are made from the open market without insisting for the genuine bills, the suppliers may be willing to sell those products at a much lower rate compared to the rate at which they may

charge in case the dealer has to give a genuine sale invoice in respect of that sale and supply of goods. There may be various factors due to which there is bound to be a substantial difference between the party purchase price of unaccounted material and rate of purchase of unaccounted for goods. There may be a saving on account of sales-tax and other taxes and duties which may be leviable in respect of manufacture of sale of goods in question. The suppliers or manufacturers make a substantial saving in the income tax in respect of income from sale of unaccounted goods produced and sold by them. This may also be one of the factors due to which the seller may be willing to charge lower rates for unaccounted goods as compared to accounted for goods. The AR has not filed the details of commission earned on this bogus transaction separately. However, from the P&L account it is seen that it has shown total commission of Rs.85,948.70 on total purchases of Rs.5,01,02,850/- which is inclusive of the bogus sales made to M/s. Rajasthan Aluminium and M/s. D.C. Metals. The same works out to 0.17% of the total purchases. The bogus purchases made from M/s. Shraddha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd is of Rs.3,82,69,759/- for the relevant accounting year. The AR has consistently argued that the rate of commission allowed in this line of business normally does not exceed more than 1% to 2% of the sale value. However, to my considered opinion the same cannot be taken on its face value, particularly in view of the lack of evidences and the clandestine nature of business carried out by the appellant. And also considering to the fact that the appellant itself has shown such commission of 0.17% (as discussed above) which is much lesser than the rate of commission admitted by the AR in the similar line of business or practice. Therefore, on account of the same, I find it would meet the end of justice, in case, the rate of commission charged by the appellant is taken @ 5% of the total purchase value of the appellant during the relevant accounting year. The same on total such purchases of Rs.3,82,69,759/- works out to Rs.19,13,488/- for the relevant assessment year. Since, the appellant has shown net difference between the sale and purchase of Rs.85,948.70 in its trading account pertaining to the bogus purchases as well as genuine trading carried out, therefore, the proportionate profit or commission pertaining to bogus transaction is worked out at Rs.65,059/- (i.e. 0.17% of Rs.3,82,69,759/-) which is already assessed to tax, therefore, considering to the same, the balance amount of RS.18,48,429/- (i.e. Rs.19,13,488/- (-) Rs.65,059/-) of addition made on this account is sustained and the remaining addition made is directed to be deleted. This ground raised by the appellant is therefore partly allowed.”

5.6.4 Before us, both revenue and the assessee have merely reiterated their respective claims (i) of revenue that the entire purchase to M/s. Shraddha Saburi Merchants Ltd. and M/s. Sai Kripa Metallic Tradecom Ltd. amounting to Rs.3,82,69,759/- be brought to tax as the assessee’s

income and; (ii) of the assessee that the commission income be assessed at 0.17% as purchases as declared by it. We find that apart from putting forth these averments, both parties have failed to bring on record any material evidence to controvert the findings rendered by the ld. CIT(A) in the impugned order on these two issues in cross appeals. In this view of the matter, and after careful consideration of the material on record, we find no reason for interference in the order of the ld. CIT(A) on both these issues before us raised respectively by revenue and the assessee. We, therefore, confirm the order of the ld. CIT(A) in holding that –

- (i) the AO was not justified in holding that the entire bogus purchases by the assessee from the aforesaid two parties amounting to Rs.3,82,69,759/- in the assessee's undisclosed income and*
- (ii) that the assessee had earned commission @ 5% for clandestinely facilitating the bogus transactions of the parties to purchases and sales. Consequently, revenue's grounds at sr. nos. 1 to 4 and the assessee's ground at sr. no. I(1) are dismissed.*

6. In the result, both the assessee's appeal for Asst. Year 2007-08 and revenue's cross appeal are dismissed."

We have observed that the facts and circumstances of the instant case before us are similar to the facts in the case of sister concern of the assessee company namely Prakash Metals vide afore-stated orders in ITA No.6457/Mum/2012 and ITA no. 6611/Mum/2012 vide orders dated 17-02-2016, Respectfully following the orders of the co-ordinate Bench of this Tribunal in ITA No.6457/Mum/2012 and ITA no. 6611/Mum/2012 vide orders dated 17-02-2016 in the case of assessee company's sister concern M/s Prakash Metals, we partly allow the

appeal filed by the assessee company by holding that the assessee company's income from these transactions be computed as 5% of commission for clandestinely facilitating the bogus transaction of the parties to the purchase and sale as held by the Tribunal in its orders in the case of the sister concern of the assessee company namely M/s Prakash Metals in ITA No.6457/Mum/2012 and ITA no. 6611/Mum/2012 vide orders dated 17-02-2016, which will meet the end of the justice which is also conceded by the assessee company's counsel to be acceptable to the assessee company to end litigation with the Revenue , keeping also in view of the afore-stated decision of the Tribunal in the case of the assessee's sister concern M/s Prakash Metals on similar facts which was stated by the learned counsel for the assessee company was also accepted by the said concern M/s Prakash Metals to end litigation with Revenue. We order accordingly."

7. In the result, the appeal filed by the Revenue in ITA NO. 3019/Mum/2014 for the assessment year 2010-11 is partly allowed as indicated above.

Order pronounced in the open court on 11th August , 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 11-08-2016 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 11-08-2016

1

व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अद्येषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "D" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai