IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 1967/MUM/2016
Assessment Year: 2008-09
&
ITA No. 1968/MUM/2016
Assessment Year: 2009-10
&
ITA No. 1969/MUM/2016
Assessment Year: 2010-11

Ganesh J Modi 115/28 J.K. Building, Dr. M G Mahimtura Marg, 3rd Kumbharwada, Mumbai-400004	Vs.	ACIT Circle 19(1), Room No. 203, 2nd Floor, Matru Mandir, Tardeo, Mumbai-400007
PAN No. AACPM0690C		
(Appellant)		**(Respondent)**

ITA No. 2770/MUM/2016
Assessment Year: 2008-09
&
ITA No. 2771/MUM/2016
Assessment Year: 2009-10
&
ITA No. 2772/MUM/2016
Assessment Year: 2010-11

ACIT Circle 19(1), Room No. 203, 2nd Floor, Matru Mandir, Tardeo, Mumbai-400007	Vs.	Ganesh J Modi 115/28 J.K. Building, Dr. M G Mahimtura Marg, 3rd Kumbharwada, Mumbai-400004
PAN No. AACPM0690C		
(Appellant)		**(Respondent)**

Assessee by: Shri Sanjiv M. Shah, AR
Revenue by: Shri Saurabh Kumar Rai, DR

Date of Hearing : 13/06/2017
Date of pronouncement: 08/09/2017

ORDER

PER BENCH

These six cross appeals-three by the assessee and three by the Revenue-for the assessment year 2008-09, 2009-10 and 2010-11 are directed against the order of the Commissioner of Income Tax (CIT)-30, Mumbai. As common issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience.

2. The grounds of appeal filed by the assessee for the impugned assessment years are as under:

1. On the facts and in law, the Ld. CIT(A) erred in upholding re-opening of assessment completed u/s 143 (3) of the Act solely on the basis of list of "suspicious dealers" uploaded on website of Sales Tax Dept., without proving that alleged bogus parties have actually provided accommodation entries to appellant.
2. On the facts and in law, the Ld. CIT(A) erred in upholding purchases made from alleged bogus parties as accommodation entries, ignoring the fact that appellant is a trader and there are documentary evidences available to substantiate purchases i.e. payments were made by account payee cheques, quantitative records are maintained and for every purchase there was corresponding sales which has been accepted by AO.

3. On the facts and in law without prejudice to above grounds of appeal, the Ld. CIT(A) erred in sustaining addition to the extent of 12.5% of the purchases (being estimated GP) on the allegation that the motive of obtaining bogus bills was to suppress true profit.
4. On the facts and in law without prejudice to above grounds of appeal, the Ld. CIT(A) erred in sustaining an addition to the extent of 12.5% of the alleged bogus purchases without reducing the GP already shown by the appellant on these alleged bogus purchases.

3. The grounds of appeal filed by the Revenue for the above assessment years are as under:

1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in confirming addition @ 12.5% of total purchases held as bogus by the AO?
2. The appellant prays that the order of the Ld. CIT(A) on the above ground be set aside and that of the AO be restored.

We begin with the earlier assessment year.

Assessment Year : 2008-09

4. The assessee is a dealer in ferrous and non-ferrous metals. In a nutshell the facts of the case are that originally the Assessing Officer (AO) made the assessment u/s 143(3) on a total income of Rs.22,76,320/-. Thereafter, he received information from the Sales Tax Department, Government of Maharashtra that the assessee had obtained accommodation entries from M/s Ananddeep Metal and M/s Siddhivinayak Steel. On the basis of the said information the AO reopened the assessment of the impugned assessment year after recording the following reasons:

"1. During the course of assessment proceedings for the AY 2010-11, It is found that this assessee has taken accommodation entries from certain parties to inflate Its purchases. An Inquiry u/s. 133(6) of the IT Act, 1961 in a number of scrutiny cases, including in the case of the assessee in AY 2010-11, revealed that several of these parties are not available at the given address and the notices have been returned by the postal dept. with the remarks 'Not Known', 'left', 'unclaimed', etc. The assessee has been unable to produce these parties or prove genuineness of purchases made from them including the transport details, delivery challans etc. This indicates that the assessee had adopted a *modus operandi* to decrease its true profits by inflating its expenses including purchase expenses by taking accommodation entries from such parties. The records of the assessee for this A.Y. also reveal that the assessee has adopted this *modus operandi* in this year as well. This is apparent from the details of purchases from these parties (from whom the assessee had taken accommodation bills) in FY 2007-08 relevant to the AY 2008-09, which are as follows: -

TIN	**Name**	**Amount of Sales to assessee in FY 2007-08 (Rs.)**
27950501934V	M/s Ananddeep Metal	1815158
27050389521V	M/s Siddhivinayak Steel	13607029
	Total	**1,54,22,187**

2. On the basis of the aforesaid tangible material available with me now, I have reason to believe that income chargeable to tax, as indicated by the accommodation bills for purchases to the tune of Rs.1,54,22,187/- from the aforesaid parties has escaped assessment for A.Y.2008-09 within the meaning of section 147 of the I.T. Act 1961. A notice u/s.148 r.w.s.147 is therefore, being issued to re-assess such income and also any other income chargeable to tax which has escaped assessment, which comes to my notice subsequently in the course of proceedings for re-assessment for A.Y.2008-09."

4.1 In response to the statutory notice issued by the AO, the assessee filed a written submission dated 12.03.2014 before him stating that (i) during the course of original assessment proceedings, copies of ledger accounts, bank statements and purchase bills of M/s Ananddeep Metal and Siddhivinayak Steel were furnished, (ii) copies of corresponding sale bills and chart showing bill-wise purchases in respect of the above two parties and the corresponding sales were also furnished.

4.2 However, the AO was not convinced with the above explanation of the assessee as the notices issued by him u/s 133(6) at the address provided by the assessee were returned back by the postal authorities as unserved. Another reason given by the AO is that the assessee failed to produce the above parties for examination. In view of the above the AO worked out the peak credit for the impugned assessment year and thus made an addition of Rs.1,08,91,173/-.

5. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) held that (i) the issue of bogus purchases was not there in the original assessment and purchases were not verified by the AO, (ii) on the date of recording reasons, new material in the form of fresh information was received by the AO, thus triggering reopening of assessment beyond four years, (iii) because of such tangible material, the AO has rightly reopened the assessment by issuing notice u/s 148 of the Act.

The Ld. CIT(A) followed the ratio laid down by the Hon'ble Gujarat High Court in the case of *CIT vs. Simit Sheth* (2013) 356 ITR 451 (Guj) and

restricted the addition to the extent of 12.5% of the purchases made as profit element embedded in it.

6. We first deal with the 1st ground of appeal. Before us, the Ld. counsel of the assessee submits that during the course of the original assessment proceedings u/s 143(3), the assessee had submitted before the AO copies of ledger accounts, bank statement and purchase bills of M/s Ananddeep Metal and M/s Siddhivinayak Steel. Also it is stated by him that copies of corresponding sale bills and chart showing bill-wise purchases in respect of the above two parties and the corresponding sales were filed before the AO. Thus it is stated by him that there was no fresh material before the AO to reopen the assessment beyond four years by issuing notice u/s 148 of the Act. On this count alone, it is argued that the impugned notice is bad in law and the reassessment be quashed.

7. *Per contra*, the Ld. DR supports the order of the Ld. CIT(A) and submits that the information on accommodation entries was received by the AO during the course of assessment proceedings for the AY 2010-11 and therefore, the AO has rightly reopened the assessment by issuing notice u/s 148.

8. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given in the succeeding paragraphs.

The issue in the impugned assessment year relates to the purchases from M/s Ananddeep Metal and M/s Siddhivinayak Steel. We have mentioned at para 4.1 here-in-above that the assessee had filed before

the AO copies of ledger accounts, bank statement and purchase bills of the above two parties. Also the assessee had filed before the AO copies of corresponding sale bills and chart showing bill-wise purchases in respect of the above two parties and the corresponding sales. We refer here to page 36-39 of the Paper Book (P/B) filed before the Tribunal.

In *CIT vs. Bhanji Lavji* (1971) 79 ITR 582 (SC), it has been held that an assessment cannot be reopened only because of change of opinion. In *CIT vs. Kelvinator of India Ltd*. (2010) 320 ITR 561 (SC), it is held that (i) after substitution of section 147 by the Direct Tax Laws (Amendment) Act, 1987, concept of 'change of opinion' must be treated as an in-built test to check abuse of power by the Assessing Officer and (ii) after 01.04.1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to conclusion that there is escapement of income from assessment; reasons must have a live link with formation of believe.

We find that in the instant case the assessee has disclosed the primary facts regarding purchases from M/s Ananddeep Metal and M/s Siddhivinayak Steel. In the case of *Kelvinator of India Ltd. (supra)*, the Hon'ble Supreme Court has held that there is a conceptual difference between power to review and power to reassess. Review means taking second view if two views are possible. If Assessing Officer has taken a

view in assessment, then he cannot change his view u/s 147 on the basis of his personal opinions. In *Direct Information Pvt. Ltd. vs. ITO* (2011) 203 Taxman 70 (Bom), the Hon'ble Bombay High Court has held that:

> "Unless Assessing Officer has tangible material before him on basis of which he comes to conclusion that income has escaped assessment, reopening of an assessment cannot be permitted merely on ground that there is a change in view of Assessing Officer and he subsequently believes that earlier view was incorrect."

Respectfully following the above judgments, we hold that the notice u/s 148 issued by the AO was bad in law. Accordingly, we allow the appeal for the AY 2008-09 filed by the assessee and dismiss the cross appeal filed by the revenue.

Assessment Year 2009-10

9. The AO completed the assessment of the AY 2009-10 u/s 143(3) on 30.11.2011 assessing the total income at Rs.19,06,230/- Thereafter, he received information from the Sales Tax Department, Government of Maharashtra that the assessee had obtained accommodation entries from M/s Ananddeep Metal, M/s Asian Steel, M/s Siddhivinayak Steel, M/s Suraj Tube Corporation, M/s Valiant Steel Engg. Co. and M/s Chanchal Tube Corporation. On the basis of the said information the AO reopened the assessment of the impugned assessment year after recording the following reasons:

"1. During the course of assessment proceedings for the AY 2010-11, it is found that this assessee has taken accommodation entries from certain parties to inflate Its

purchases. An Inquiry u/s. 133(6) of the IT Act, 1961 in a number of scrutiny cases, including in the case of the assessee in AY 2010-11, revealed that several of these parties are not available at the given address and the notices have been returned by the postal dept. with the remarks 'Not Known', 'left', 'unclaimed', etc. The assessee has been unable to produce these parties or prove genuineness of purchases made from them including the transport details, delivery challans etc. This indicates that the assessee had adopted a *modus operandi* to decrease its true profits by inflating its expenses including purchase expenses by taking accommodation entries from such parties. The records of the assessee for this A.Y. also reveal that the assessee has adopted this *modus operandi* in this year as well. This is apparent from the details of purchases from these parties (from whom the assessee had taken accommodation bills) in FY 2008-09 relevant to the AY 2009-10, which are as follows: -

TIN	**Name**	**Amount of Sales to assessee in FY 2008-09 (Rs.)**
27950501934V	M/s Ananddeep Metal	14436309
27860346638V	M/s Asian Steel	2225469
27050389521V	M/s Siddhivinayak Steel	2594989
27550304371V	M/s. Suraj Tube Corporation	1589608
27420690454V	M/s Valiant Steel Engg Co	284730
27460355491V	M/s Chanchal Tube Corporation	1252113
	Total	22383218

2. On the basis of the aforesaid tangible material available with me now, I have reason to believe that income chargeable to tax, as indicated by the accommodation bills for purchases to the tune of Rs.2,23,83,218/- from the aforesaid parties has escaped assessment for A.Y.2009-10 within the meaning of section 147 of the I.T. Act 1961. A notice u/s.148 r.w.s.147 is therefore, being issued to re-assess such income and also any other income chargeable to tax which has escaped assessment, which comes to my notice subsequently in the course of proceedings for re-assessment for A.Y.2009-10."

9.1 The AO issued notice u/s 133(6) calling for information to verify the genuineness of the purchases from the said six parties. The said notices were returned back as undelivered in the case of three parties and reply was not received in the case of balance three parties. Then the AO asked the assessee vide order sheet noting dated 24.12.2013 to produce the above parties for examination. The assessee failed to produce the above parties before the AO for examination. The assessee filed documentary evidence in support of the above purchases. However, the AO was not convinced with the explanation of the assessee and made an addition of peak credit of Rs.2,15,09,510/-.

10. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A) has held the reopening of assessment as valid on the basis of reasons mentioned at para 5 here-in-above. The Ld. CIT(A) followed the ratio laid down by the Hon'ble Gujarat High Court in *Simit Sheth (supra)* and sustained the addition to the extent of 12.5% of the purchases made as profit element embedded in it.

11. Before us, the Ld. counsel of the assessee submits that (i) the AO generally alleges *modus operandi* to decrease true profits without setting out how, when and in what manner it is conducted, (ii) since such profit emanating from sales is already reflected in trading account, no further addition is called for and thus no income has escaped assessment, a *sine-qua-non* for acting u/s 147 r.ws. 148, (iii) on this count alone, impugned notice is *ex facia* without anything further is warranted, (iv) all details pertaining to purchases/stock/quantitative details/gross profit asked for were produced/explained in original assessment proceedings in response to questionnaire and (v) the AO has not passed any order much less a separate and distinct order adjudicating on the objections of the assessee prior to framing of reassessment order on merits.

11.1 In this regard the Ld. counsel relied on the decision in *CIT vs. Kelvinator of India Ltd*. (2010) 320 ITR 561 (SC), *Siemens Information System Ltd. vs. ACIT* (2007) 295 ITR 333 (Bom), *ITO vs. Lakhmani Mewaldas* (1976) 103 ITR 437 (SC), *Pr. CIT vs. Tupperware India Pvt. Ltd*. (ITA No. 415/2015) by Delhi High Court, *CIT vs. M/s Trend Electronics* (ITA No. 1867 of 2013) by Bombay High Court.

11.2 The Ld. counsel further submits that on merits the addition is not sustainable because of the following reasons:

i. purchases are supported by clinching evidences (a) bills and challans-; ledger accounts; bank statement- ; chart showing lot to lot corresponding sale of each purchase; stock register and quantitative details; tax audit report; names and addresses of parties; VAT and CST Tin numbers; payment by account payee cheques- (KYC documents);

ii. merely because suppliers failed to appear when other overwhelming proofs are available which are not impeached as fabricated;
iii. mere reliance upon information of sales tax department without making further and independent enquiry is not enough and AO did not bring any adverse material on record;
iv. every corresponding purchase has a sale;
v. books of accounts not rejected;
vi. purchase and sales recorded in books of accounts;
vii. quantitative details and stock register;
viii. sales not rejected by AO;
ix. stock reconciliation statement filed;
x. AO could have obtained details from bankers of suppliers to find out whether there was any immediate cash withdrawals;
xi. CIT(A) gave no justification for sustaining partial addition (20%);
xii. gross profit rate is better than previous year [if addition is sustained gross profit ratio becomes abnormally high];
xiii. accounts have been audited u/s 44AB of Act.

12. *Per contra*, the Ld. DR supports the order of the Ld. CIT(A) and submits that the information on accommodation entries was received during the assessment proceedings for the AY 2010-11 and therefore, the AO has rightly reopened the assessment by issuing notice u/s 148. The Ld. DR also submits that the Ld. CIT(A) has rightly restricted the disallowance to 12.5% of the purchases made as profit element embedded in it, following the ratio laid down in *Simit Sheth (supra)*.

13. We have heard the rival submissions and perused the relevant materials on record. We give the reasons for our decision in succeeding paragraphs.

It would be appropriate to discuss the case laws relied on by the Ld. counsel of the assessee. In the case of *Kelvinator of India Ltd. (supra)*, it is held that after 01.04.1989, the AO has power to reopen, provided there is 'tangible material' to come to conclusion that there is escapement of income ; reasons must have a live link with formation of belief. We find that in the instant case the AO received tangible material from the Sales Tax Department, Government of Maharashtra that the assessee had obtained accommodation entries from six parties to inflate its purchases. We have extracted the reasons recorded by the AO at para 9 here-in-above. A reading of it clearly shows that the reasons have a live link with formation of belief. The case of *Kelvinator of India Ltd. (supra)* rather supports the case of the revenue.

In *Siemens Information System Ltd. (supra)*, it is held that mere change of opinion on an interpretation of a provision, by itself, without anything more, cannot form basis of reopening a completed assessment. This is not so in the instant case. The assessee in the instant case failed to disclose the primary facts before the AO in the original assessment proceedings. There is no change of opinion by the AO in the subsequent reassessment.

In *Lakhmani Mewaldas (supra)*, it is held that reasons for formation of belief contemplated by section 147(a) for reopening of assessment must have rational connection with or relevant bearing on formation of belief, and rational connection postulates that there must be direct nexus or live link between material coming to Income-tax Officer's notice and formation of his belief that there has been escapement of assessee's

income from assessment in particular year because of his failure to disclose fully and truly all material facts. We have gone through the reasons recorded by the AO for reopening the assessment in the instant case. We have extracted it at para 9 here-in-above for reference. We find that reasons recorded by the AO have rational connection on formation of belief by him.

In *Tupperware India Pvt. Ltd. (supra)*, it is held that the AO has to mandatorily dispose of the objections to the reopening order with a speaking one as per decision in *G.K.N. Driveshafts (India) Ltd. vs. ITO* (2003) 259 ITR 19 (SC). We find that in the instant case the assessee has filed a reply dated 05.02.2014 in response to the statutory notice issued by the AO. The AO has extracted it at para 5.6 of the assessment order. The assessee has also filed before us a copy of it which is at page 37-39 of the Paper Book (P/B). We find that there is no mention by the assessee of objection to the reopening by the AO. The Ld. counsel has not enclosed a copy of the objection of reopening in the P/B. The AO has dealt with the submission dated 05.02.2014 made by the assessee in the assessment order. Therefore, the case of the assessee is distinguishable from *Tupperware India Pvt. Ltd. (supra).*

In the case of *M/s Trend Electronics (supra)*, an order passed in reassessment proceedings was held as bad in law in absence of reasons recorded for issuing notice u/s 148 being furnished to the assessee when sought for. This is not the case in the instant appeal as evident from the reply dated 05.02.2014 filed by the assessee in response to the notice issued by the AO.

From the above, it is crystal clear that the AO has rightly issued notice u/s 148 for reopening the assessment made u/s 143(3).

We are not referring to the orders of the Tribunal relied on by the Ld. counsel of the assessee in respect of notice issued u/s 148 as they remain in the domain of their specific facts.

13.1 We find that the assessee had not disclosed the primary facts regarding purchases from the above six parties during the course of original assessment proceedings made u/s 143(3) by the AO on 30.11.2011. The AO had issued notice to the assessee to prove the genuineness of transaction with the above six parties. The assessee filed a reply to it, which has been extracted by the AO at para 5.6 of the assessment order dated 21.03.2014. A copy of the said reply was filed before us which is at page 37-39 of the P/B. A perusal of it indicates that the assessee did not file the details regarding the above six parties before the AO during the course of original assessment proceedings.

13.2 At this juncture we come across a catena of precedents on the instant issue. In order to avoid prolixity, we refer below to only a few decisions.

Assessee must disclose all primary facts fully and truly. The words 'omission or failure to disclose fully and truly all material facts necessary for his assessment for that year' postulate a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. There can be no doubt that the duty of disclosing all the

primary facts relevant to the decision on the question before the AO lies on the assessee as held in *Calcutta Discount Co. Ltd. vs. ITO* (1961) 41 ITR 191, 200 (SC),*Malegaon Electricity Co. P. Ltd. vs. CIT* (1970) 78 ITR 466 (SC), *CIT vs. Bhanji Lavji* (1971) 79 ITR 582 (SC), *CIT vs. Burlop Dealers Ltd*. (1971) 79 ITR 609 (SC),*ITO vs. Lakhmani Mewal Das* (1976) 103 ITR 437, 445 (SC),*Associated Stone Industries (Kotah) Ltd. vs. CIT* (1997) 224 ITR 560, 572 (SC).

Every disclosure is not and cannot be treated to be a true and full disclosure. A disclosure may be a false one or true one. It may be a full disclosure or it may not be. A partial disclosure may very often be a misleading one. In *Shri Krishna (P.) Ltd. vs. ITO* [1996] 87 Taxman 315 (SC) it has been held that what is required is a full and true disclosure of all material facts necessary for making assessment for that year.

Where transaction itself, on basis of subsequent information, is found to be bogus transaction, mere disclosure of that transaction at the time of original assessment proceedings cannot be said to be a disclosure of the 'true' and 'full' facts and the ITO would have jurisdiction to reopen concluded assessment in such a case as held in *Phool Chand Bajrang Lal vs. ITO* [1993] 203 ITR 456 (SC).

In a recent decision the Hon'ble Gujarat High Court in *Peass Industrial Engineers (P.) Ltd. vs. DCIT* (2016) 73 taxmann.com 185 (Guj) has held that:

> "Where after scrutiny assessment Assessing Officer received information from investigation wing that two well known entry operators of country provided

bogus entries to various beneficiaries, and assessee was one of such beneficiary, Assessing Officer was justified in reopening assessment."

In a similar case involving beneficiary of accommodation entries, the Hon'ble Bombay High Court in the case of *Om Vinyls P. Ltd. vs. ITO* [Writ Petition (L) No. 3114 of 2014] has held that:

> "The information received by the Assessing Officer on which basis the impugned notice is issued is specific. There is no ambiguity in the information which would require investigation. The information of accommodation entries has been given by a participant and this is reason enough to believe that income chargeable to tax has escaped assessment. At this stage, the Assessing Officer is not required to conclusively prove that the reasons in support of the impugned notice establish that the petitioner has taken accommodation entries. This is a matter which would be subject of further investigation during the reassessment proceedings. At that stage it would be open to the petitioner to raise all permissible defences and also to insist on cross examination of the persons who have made a statement implicating the petitioner in having participated in taking accommodation entries. However these are subject matters of investigation into adjudicatory facts and this Court would not in the present facts at the very threshold prevent the Assessing Officer from making further enquiry into a prima facie view which has been formed in the reasons indicated in support of the impugned notice "

13.3 After examining the present factual matrix on the anvil of the aforesaid enunciation of law, we dismiss the 1st ground raised by the assessee against the reopening done by the AO u/s 148 of the Act.

14. Now we discuss together the 2nd, 3rd and 4th ground of appeal as they address a common issue. As mentioned above, the AO had issued

notice u/s 133(6) to the above six parties to verify the genuineness of purchase transaction. The letters issued by him to three parties came back with the remark 'returned undelivered' by the postal authorities. The AO did not receive reply from the other three parties. Then the AO requested the assessee to produce the above six parties for examination. The assessee failed to produce the said six parties before the AO. We also find that a reply dated 05.02.2014 has been filed by the assessee in response to notice issued by the AO.

A proper hearing must always include a 'fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view. Cross-examination is allowed by procedural rules and evidently also by the rules of natural justice. Any witness who has been sworn on behalf of any party is liable to be cross-examined on behalf of the other party to the proceedings.

The Hon'ble Supreme Court in *State of Kerala vs. K.T. Shaduli Grocery Dealer* AIR 1977 SC 1627, recognised the importance of oral evidence by holding that the opportunity to prove the correctness or completeness of the return necessarily carry with it the right to examine witnesses and that includes equally the right to cross-examine witnesses.

In *ITO vs. M. Pirai Choodi* (2012) 20 taxmann.com 733 (SC), the Hon'ble Supreme Court has held that "Order of assessment passed without granting an opportunity to assessee to cross-examine, should not have been set aside by High Court; at most, High Court should have directed Assessing Officer to grant an opportunity to assessee to cross-examine concerned witness."

In a similar case of a beneficiary of accommodation entries, their Lordships of the Hon'ble Bombay High Court in the case of *Om Vinyls P. Ltd. (supra)* have observed that it would be open to the assessee to raise all permissible defences and also to insist on cross-examination of the persons who have made a statement implicating the assessee in having participated in taking accommodation entries.

14.1 In view of the above position of law, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a fresh assessment after examining the concerned parties and giving opportunity of cross-examination to the assessee. We direct the assessee to file the relevant details before the AO. Needless to say, the AO would give reasonable opportunity of being heard to the assessee before finalizing the assessment order.

As we have restored the matter to the file of the AO, we are not adverting to the case-laws referred by the Ld. counsel of the assessee and Ld. DR on the merit of the additions.

15. In the result, the appeal of the assessee for the AY 2009-10 is partly allowed for statistical purposes. The appeal of the revenue is allowed for statistical purposes.

Assessment Year 2010-11

16. The AO noticed that during the year under consideration the assessee had purchased goods from the ten parties who appear in the list of suspicious parties providing accommodation entries by issuing bogus

bills in the website of Sales Tax Department, Government of Maharashtra. The AO to verify the genuineness of transactions issued notice u/s 133(6) to them. The notices could not be served and were returned back unserved by the postal authorities with the remark 'not known', 'left', 'unclaimed'. In some cases notices were served but no compliance or incomplete compliance was made. The details mentioned by the AO are as under:

Name of the Party	**Purchase Amount (Rs.)**	**Remarks**
M/s Ananddeep Metal	70,78,090	Not Known
M/s Asian Steel	19,87,324	No Reply
M/s Prakash Steelage Ltd.	6,70,956	No Reply
M/s Rinku Steel Corporation	1,32,77,487	No Reply
M/s Romex Tubes & Fittings	78,70,262	Left
M/s Siddhi Vinayak Steel	47,88,802	No Reply
M/s Suraj Tube Corporation	40,27,089	No Reply
M/s Valiant Steel Engg Co	35,70,781	Left
M/s Vidhi Metal Industries	42,73,991	Not Known
M/s Chanchal Tube Corporation	10,87,744	No Reply

In response to the notice issued by the AO, the assessee produced ledger copies, purchase bills, payment details but in certain cases he did not submit any delivery challans/transport bills or any other document which could prove the actual delivery of goods. The assessee also submitted the statements of his bank accounts, highlighting the payments shown to have been made to these parties.

However, the AO held that the suspected sales tax hawala parties were non-existent and never supplied any material to the assessee and therefore, the purchases made from them were not genuine. As the

incremental peak became nil in the impugned assessment year, the AO refrained from making any addition.

16.1 We find that the order of the Ld. CIT(A), the argument of the Ld. counsel of the assessee and Ld. DR are same as in AY 2009-10. We need not repeat the same.

17. Having heard the rival submissions and perused the relevant materials on record, we are of the considered view that opportunity of cross-examination be given to the assessee as per the ratio laid down by the Hon'ble Supreme Court in *K.T. Shaduli Grocery Dealer(supra), M. Pirai Choodi (supra)* and the Hon'ble Bombay High Court in *Om Vinyls P. Ltd. (supra).* Therefore, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make an assessment afresh after examining the parties and giving opportunity of cross-examination to the assessee. We direct the assessee to file the relevant details before the AO. Needless to say, the AO would give reasonable opportunity of being heard to the assessee before finalizing the assessment order.

As we have restored the matter to the file of the AO, we are not adverting to the case-laws referred by the Ld. counsel of the assessee and Ld. DR on the merit of the additions.

18. In the result, the appeal for the AY 2010-11 of the assessee and the revenue are allowed for statistical purposes.

19. To sum up, (i) the appeal for the AY 2008-09 filed by the assessee is allowed; the cross appeal filed by the revenue is dismissed, (ii) the appeal

for the AY 2009-10 filed by the assessee is partly allowed for statistical purposes; the cross appeal of the revenue is allowed for statistical purposes, (iii) the appeal for the AY 2010-11 filed by the assessee and the cross appeal by the revenue are allowed for statistical purposes.

Order pronounced in the open Court on 08/09/2017.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 08/09/2017
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai