आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

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

BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.3941/Mum/2017

(**निर्धारण वर्ष /** Assessment Year : 2010-11)

Income Tax Officer-25(2)(1) Room No. 505, C-10, 5th Floor, Pratyakshkar Bhavan, BKC, Bandra(East), Mumbai-400051	**बनाम**/ v.	Actube Enterprises 27, Laxmi Flat Owner CHS Limited , M.G. Road Extension, Vile Parle(East), Mumbai-400057
स्थायी लेखा सं./PAN: AABFA2570J		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Shri. Vivek Anand Ojha (DR)
Assessee by:	Apurva R. Shah (AR)

सुनवाई की तारीख **/Date of Hearing : 01.07.2019**
घोषणा की तारीख **/Date of Pronouncement : 05.08.2019**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by Revenue, being ITA No. 3941/Mum/2017, is directed against appellate order dated 15.03.2017 in Appeal No. CIT(A)-37/IT-722/ITO-25(2)(1)/15-16, passed by learned Commissioner of Income Tax (Appeals)-37, Mumbai (hereinafter called "the CIT(A)"), for assessment year(AY) 2010-11, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 31.12.2015 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) r.w.s. 147 of the Income-tax Act, 1961 (hereinafter called "the Act") for ay:2010-11.

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

> *"1. On the facts and circumstances of the case and in law, the learned Commissioner of Income-tax(Appeals) has erred in deleting the addition of Rs.45,12,259/- on account of bogus purchases.*
>
> *2. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax(Appeals) has erred in not considering that the addition was made on the basis of information received from the DIT(Inv.) and Sales Tax Department, Maharashtra with regard to bogus purchases made by the assessee from dealers without supply of actual goods.*
>
> *3. On the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax(Appeals) has erred in not considering that the hawala dealers have admitted before the Sales Tax Authorities that they have not sold any material to anybody.*
>
> *4. On the facts and circumstances of the case and in law the learned Commissioner of Income-tax(Appeals) has erred in not considering that the assessee could not prove the delivery of material received from the Havala Parties and also failed to produce the stock register.*
>
> *5. On the facts and circumstances of the case and in law, the learned Commissioner of Income-tax(Appeals) has erred in estimating the profit at 12.5% on the total alleged bogus purchases from hawala dealers.*
>
> *6. On the facts and circumstances of the case and in law, the learned Commissioner of Income-tax(Appeals) has erred in not appreciating the decision of the Hon'ble Supreme Court in the case of N.K. Proteins Ltd. Vs. Dy.CIT (2017-TIOL-23-SC-IT) dated 16.01.2017 wherein the Hon'ble Apex Court confirmed the decision of the High Court for addition of entire income on account of bogus purchases.*
>
> *7. On the facts and circumstances of the case and in law, the learned Commissioner of Income-tax(Appeals) has erred in not appreciating that purchases were made from some other parties which were not recorded in the books of accounts and only accommodation bills were obtained from Hawala parties and there by attracting provisions of section 40A(3).*

8. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that applicability of provisions of 40A(3) attracts 100 % bogus purchases to be held as profit.

9. The appellant prays that the order of the CIT(A) on the grounds be set aside and that of assessing officer be restored.

10. The appellant craves leave to amend or to alter any ground or add a new ground, which may be necessary."

3. This appeal filed by Revenue was earlier dismissed by tribunal vide orders dated 03.08.2018 owing to low tax effect as Revenue appeal was held by tribunal to be covered by CBDT circular no. 03/2018 dated 11.07.2018. Later, Revenue came up with Miscellaneous Application('M.A.') citing that this appeal was not covered by the aforesaid CBDT circular as exception to the said CBDT Circular is applicable , wherein the information was received from external sources being Maharashtra VAT department based on which additions were made to the income of the assessee towards bogus purchases. The tribunal vide its order dated 03.05.2019 in MA No. 189/Mum/2019 arising out of ITA no. 3941/Mum/2017 for ay: 2010-11 was pleased to recall its order dated 03.08.2018 and that is how this appeal is now heard by this Bench to be adjudicated on merits in accordance with law instead of its earlier dismissal in limine on the grounds that it is a low tax effect appeal being covered by aforesaid CBDT circular dated 11.07.2018. Both the parties have now advanced their arguments before the Bench in this appeal on merits laying down their propositions and contention to support their stand.

4. The brief facts of the case are that the assessee is a firm and is engaged in the business of manufacturing & supplying goods as per requirements of different railway workshop wherein it supplies engineering goods, consumables, hardware etc.. The AO received information that the assessee is engaged into practice of inflating its purchases by taking accommodation entries through hawala parties. These parties are appearing in the list of suspicious dealers, who had

issued accommodation bills without delivery of goods as per information received by AO from Sales Tax Department of Maharashtra Government through DGIT (Inv.), Mumbai vide letter bearing no. Corr. Field/DGIT (Inv)/2013-14 dated 20.01.2014 and also this information is found reported on Maharashtra Sales Tax web-site , the details of such alleged bogus purchases are as under:-

Sl. NO.	Name of the party	VAT No.	Transaction amount (In Rs.)
1	Alok Trading Co..	27440561142V	1,17,524
2.	Anlket Industries	27960621869V	8,09,923
3.	Mico Steels	27930713987V	8,75,477
4.	R.K. Matel	27340354975V	10,77,652
5.	Ujwal Enterprises	27940626827V	12,83,842
6.	Bohra Metal Industries	27190660365V	2,23,142
7.	Bhagyalaxml Steel Industries	27810631797V	7,69,307
		Total	51,56,867

4.2 Based on the above tangible incriminating information, the AO reopened the concluded assessment by invoking provisions of Section 147 of 1961 Act, after recording reasons for reopening of the concluded assessment . Notice u/s. 148 was issued by the AO to the assessee on 25.02.2015 which was duly served on the assessee on 07.03.2015. Thus it can be seen that notice u/s. 148 was issued by AO within four years from the end of the assessment year and also originally no assessment was framed by the AO u/s. 143(3) of the Act and return of income was only processed originally u/s 143(1) of the 1961 Act. In order to verify genuineness of these purchases, the AO issued notices u/s. 133(6) of the 1961 Act to these aforesaid seven parties at the addresses furnished by the assessee. However, the said notices were returned un-served by the postal authorities with

remarks 'left' and 'not known'. Thus , genuineness of these purchases could not be verified by the AO owing to non service of notices u/s 133(6) of the 1961 Act. The AO asked assessee to produce these parties but the assessee failed to produce these hawala parties before the AO , from whom the assessee had claimed to have made purchases to the tune of Rs. 51,56,867/- . The AO asked assessee to produce books of accounts, bank statements, bills/vouchers to prove that these purchases are genuine . It was also observed by AO that these hawala parties have admitted before the Sales Tax Department, Mumbai that they were engaged in providing hawala accommodation entries without supplying any material physically. The AO also noted that even independent enquiries were made by Revenue which also proved that these were bogus accommodation entries being provided by these hawala dealers who are issuing accommodation bills without supplying any material physically. The AO also referred to provision of section 101,102 and 106 of the Indian Evidence Act 1872 and concluded that the assessee has failed to discharge its primary onus to establish that these purchase are genuine purchases. The AO also observed that merely filing of documentary evidences in support of purchases and payments being made through banking channel cannot be conclusive that these purchases are genuine. The AO also observed that Maharashtra VAT department has concluded after enquiries that these parties were issuing false bills without supplying material physically. These parties have accepted cheques against false bills and cash was returned after deducting their commissions. The assessee could not produce these parties before the AO and notices issued u/s 133(6) also returned un-served. The assessee could not produce stock register showing movement of goods purchased and consumed. Thus, it was concluded by the AO that colourable devices were used by the assessee to defraud Revenue. Several case laws were relied upon by the AO which are cited in its assessment order to decide the issue against the asssessee, wherein 100% of the alleged bogus purchases from these seven parties stood added to the income

of the assessee. The AO concluded that the books of accounts of the assessee do not reveal true and correct financial status of the assessee. The books of accounts were rejected by AO by invoking provisions of Section 145 of the 1961 Act. The AO made additions to the income of the assessee to the tune of Rs. 51,56,867/- by invoking provisions of Section 69C of the 1961 Act being 100% of the alleged bogus purchases, vide assessment order dated 31.12.2015 passed by the AO u/s 143(3) read with Section 147 of the 1961 Act.

5. Aggrieved by an assessment framed by the AO u/s 143(3) read with Section 147 of the 1961 Act, the assessee filed first appeal with learned CIT(A). The assessee submitted before learned CIT(A) that it has duly submitted copies of purchase bills , ledger account copies of supplier, copies of bank statement and statement showing details of disposal of purchases alongwith copies of Sales Bills for corresponding supplies to Railways and documentary evidences regarding transportation. The assessee submitted that all payments were made for purchases through account payee cheques. The assessee submitted that materials were purchased from these parties which was later sold and payments were made to these parties through account payee cheques. The assessee submitted that the AO merely relied upon the findings given by Sales Tax Department. The assessee submitted that the AO relied upon the statements of these parties but the copies of the said statements were not given by the AO to the assessee for rebuttal. The assessee placed reliance on following case laws to support its contentions:

a) CIT v. Nikhunj Eximp Enterprises Private Limited ITA No. 5604 of 2010(Bom.HC),dated 17.12.2012

b) Rajesh P. Sonivs v. ACIT, (2006) 100 TTJ 892(Ahd.)

c) CIT v. M.K. Brothers (1987) 163 ITR 249(Guj.)

d) CIT v. Bholanath Poly Fab Private Limited (2013) 40 taxmann.com 494(Guj.)

5.2 The assessee also submitted that these purchases are reflected in its books of accounts. It was also submitted by assessee before learned CIT(A) that the assessee has duly reflected these purchases in sales tax return filed by the assessee with Sales Tax Department. It was claimed by the assessee before learned CIT(A) that accounts of the assessee are duly audited by a chartered account u/s. 44AB of the 1961 Act. It was claimed by assessee before learned CIT(A) that payments for these purchases were made by account payee cheques which are duly reflected in the bank statements. It was submitted that merely because suppliers are not available and could not be produced before the authorities below, the additions could not be sustained. The Ld. CIT(A) after considering the submission of assessee restricted the addition to profits embedded in these purchases to the tune of 12.5% of this alleged bogus purchases vide appellate order dated 15.03.2017, by holding as under:-

> *"5. I have considered the facts, oral contentions and written submissions of the appellant as against the observations/findings of the AO in assessment order. The submissions and contentions of the appellant are being discussed and decided as under:-*
>
> *5.1 All the grounds raised are related to additions of Rs. 51,56,867/-. For the sake of convenience, all the grounds are disposed together.*
>
> *5.2 In this case information was received from Sales tax Authorities, Mumbai that the appellant has obtained bogus bills from aforesaid parties without any supply of goods from them. The A.O. asked the appellant to produce the sufficient evidence and establish the genuineness of transactions said parties before him. However, the appellant failed to do so. The sales shown by the appellant are not doubted or proved non genuine by the AO. The logical corollary of this is that the appellant must have made purchases or else where from he could have effected*

the sales. In this regard it is submitted by the Ld, A.R. that he had submitted the details of purchase, invoice bills along with the detail of the bank transaction before the assessing officer. Further the appellant had also explained that the payments have been made by account payee cheques. AO has rejected the books of accounts u/s.145(3) of the Act. There was neither any change in the method of accounting as compared to earlier year nor any change in any accounting policy. The books of accounts are audited under section 44AB of the I.T. Act, 1961. The entire tax audit report is already submitted before AO during assessment proceedings. There were no adverse remark by Tax Auditor.

5.3 It is clear that when the Assessing Officer does not accept the assessee's method of accounting then he has to resort to the provision of sec. 145(3) for computation of income. The Karnataka High Court in the case of Karnataka State Forest Industries Corpn. Ltd. Vs. CIT (1993) 201 ITR 674 has held that the assessing officer's power under section are not arbitrary and he must exercise his discretion and judgment judicially. A clear finding is necessary before invoking the provision sec.145(3) of the I T Act. The Assessing officer has not been able to point out any defect or mistake or error in the books of accounts. He has accepted the sales receipts. The Assessing officer has to bring on record the material on the basis of which he has arrived at the conclusion with regard to correctness or completeness of the accounts of the assesse or the method of accounting employed by it. The Assessing officer has simply rejected on the basis of non compliance with the 133(6) and failure to produce the suppliers before Assessing officer after 3 years from the date of purchase. The Assessing officer in appellant's own case has accepted the books of accounts on similar facts for the A.Y.2010-11. In the case of ACIT vs. ITD Cementation India Ltd (2014) 146 ITD 59 /160 TTJ Mumbai, it has been held that where books of account of assessee were audited and auditor had not given adverse comments on maintenance of books of account or stock register, it was apparent that assessee's books of account are genuine and the Assessing officer was wrong in rejecting the same. In appellant's case, auditor has not given any adverse comments in maintenance of books of account or stock register.

5.4 In view of the above, it is difficult to accept that the books of accounts of the assessee are defective or incomplete from which the correct profit cannot be computed. The auditor has not given any adverse comment

in maintenance of books of accounts or stock register. The Assessing officer has also not specified for reasons of rejecting the books of accounts. Hence, the rejection of books of account cannot be sustained.

5.5 During the appellate proceedings, the appellant has vehemently argued that the appellant had submitted sufficient documents and details of bank account, wherein these payments made to these parties through normal banking channel have been reflected were submitted during the assessment proceedings. Identical issue came up before the Hon'ble High Court of Gujarat in the case of Commissioner of Income v. Bholanath Poly Fab. P. Ltd. Reported in 355 ITR 290 (Guj.). In this case, the assessee was engaged in the business of trading in finished fabrics. The AO disallowed purchase amounting to Rs.40,69,546/- as bogus/unexplained. The CIT(A) confirmed the action of the AO. The issue was carried in appeal before the Hon'ble Tribunal which concurred with the finding of the revenue authorities below that such purchase was made from bogus parties. After adverting to the facts and data placed before it, the Hon'ble Tribunal noted that the entire cloth of 1,02,514 metres was sold during the year and therefore, accepted the assessee's contention that finished goods purchased by the appellant may not be from the parties shown in the accounts but from other parties. In view of this the Hon'ble ITAT was of the view that only profit margin embedded in such purchases would be subjected to tax. The Hon'ble Tribunal relied on its earlier decision in the case of M/s.Saket Steel Traders v. ITO (ITA No. 2801/Ahd/2008 dated 20.05.2008) and also made reference to the decision in the case of Vijaya Protein v. CIT 58 ITD 428 (Ahd.). On appeal by the department the Hon'ble HC of Gujarat, dismissed he appeal. The head note is as under:

"Income from undisclosed sources - Assessment - Assessee trading in finished fabrics -Whether purchases themselves bogus -Whether parties from whom such purchases were made bogus-questions of fact - Tribunal finding assessee did purchase cloth and sell finished fabrics - Not entire purchase price but profit element embedded in purchases liable to tax-Income tax Act, 1961.

The assessee for the assessment year 2005-06 was engaged in the business of trading in finished fabrics. The assessing officer held that purchases worth Rs.40,69,546/- were unexplained and disallowed the expenditure claimed by the assessee and computed the total income of Rs.41,10,187/-. In so far as the question of

bogus purchases was concerned the Tribunal concurred with the Revenue's views that such purchases were allegedly made. Such notices were returned unserved by the postal authorities with the remark that the addresses were incomplete. The inspector deputed but the Income Tax Department also could not find any of the parties available at the given addresses. The assessee was unable to produce any confirmation from any of the parties. Though the assessee had claimed to have made payment by account payee cheques, upon verification it was found that the cheques were encashed by some other parties and not by the supposed sellers. However, the Tribunal was of the opinion that though the purchases might have been made from bogus parties the purchases themselves were not bogus. The tribunal adverted to the facts and data on record and came to the conclusion that the entire quantity of opening stock, purchases and the quantity manufactured during the year 2005-06 were sold by the assessee. Therefore the purchases of the entire l,02,514 mtres of cloth were sold during the year 2005-06. The Tribunal therefore accepted the assessee's contention that the finished goods were purchased by the assessee though not from the parties shown in the accounts but from other sources. The Tribunal was of the opinion that not the entire amount but the profit margin embedded in such amount would be subject to tax.

5.6 In the case of M/s.Sanjay Oilcake Industries v. Commissioner of Income tax reported in 316 ITR 274 (Guj) The Hon'ble Court had upheld the action of the CIT(A) and ITAT in determining estimated addition of 25% of the purchases in cases involving bogus purchases. The head note is as under:-

"Assessment income from undisclosed sources - Additions on account of inflated purchase price - Estimate- Not a question of law - No material produce by assessee to disprove inflated purchases - Tribunal's order in accordance with law - Income Tax Act, 1961.

Whether an estimate should be at a particular sum or at a different sum can never be a question of law.

For the assessment years 1984-85 and 1985-86 the Assessing Officer made additions to the income of the assessee on account of inflated purchase price of oilcakes. The Commissioner (Appeals) held that 25 per cent of the value of the purchase price was not genuine and the addition made by the Assessing Officer was accordingly restricted to 25 percent of the amount paid to the parties

from whom the assessing officer had disallowed the entire purchases. On cross appeals by the assessee and the revenue the Tribunal confirmed the order of the Commissioner (Appeals.) The assessee sought modification of the order on the ground that the tribunal had failed to consider various pieces of evidence enumerated by it in the application. The Tribunal rejected the application holding that there was no apparent error or record which would permit the Tribunal to undertake review of its own order. On a reference to the High Court : Held that the finding of the Assessing Officer had been accepted by the Commissioner (Appeals) an the Tribunal that the apparent sellers who had issued sale bills were not traceable. The goods were received from the parties other than the persons who had issued bills for such goods. Though the purchases were shown to have been made by making payment therefore by account payee cheques and the cheques had been deposited in bank accounts ostensibly in the name of the apparent sellers, thereafter the entire amounts had been withdrawn by bearer cheques and there was no trace or identity of the person withdrawing the amount from the bank accounts. Both the Commissioner (Appeals) and the Tribunal had come to the conclusion that in such circumstances the likelihood of the purchase price being inflated could not be ruled out and there was no material to dislodged such finding. The assessee had by evidence available on record made it possible for the recipients not being traceable for the purpose of inquiry as to whether the payments made by the asessee had been actually received by the apparent sellers. Hence the estimate made by the appellate authorities did not warrant interference.

5.7 Recently in the case of Commissioner of Income tax v Simit P Sheth 356 ITR 451 (Guj) the Hon'ble Court has given a finding that estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick could be adopted and finally confirmed the action of the ITAT in determining 12.5% of the bogus purchases as the profit embedded in such transaction. The head note is as under:

Income from undisclosed sources - Assessee trading in steel- Finding that purchase recorded by it were not bogus but from other parties not recorded in books -

Estimation of profit element embedded in purchases Tribunal justified in estimation on the basis of facts Income tax Act 1961.

The assessee was engaged in the business of trading in steel on wholesale basis. During the course of the reassessment proceedings for the year 2006-07, the Assessing Officer noticed that some of the supplies of steel to the assessee had made their statements on oath to the effect that they had not supplied the steel to the assessee but had only provided sale bills. In turn they were receiving a small commission. The Assessing Officer concluded that the total purchase of Rs.41,04,903/- cumulatively made from the three parties were bogus. He thus treated such purchase as bogus purchases and added the entire amount of Rs. 41,04,903/- to the gross profit of the assessee. He also rejected the books of account and estimated the assessee's business profit at Rs. 5 lakhs. The Commissioner (Appeals) held that the asessee had made purchases from other parties in the open market. Therefore he retained 30 percent of the purchases cost at the probable profit of the assessee, He reduced the additions from Rs,41,04,903/- to Rs.12,31,471!- and deleted the balance of R.28,73,432/-. While doing so he deleted the addition of Rs, 5 lakhs as made by the assessing Officer on the ground that the addition on account of bogus purchase had already been made. The Tribunal was of the opinion that twelve and half percent of the disputed purchases should be retained in the hands of the assessee as business profits. On appeal to the High Court:

Held dismissing the appeal that the Commissioner (Appeals) believed that the purchases were not bogus but were made from the parties other than those mentioned in the books of account. That being the position, not the entire purchase price but only the profit element embedded in such purchases could be added to the income of the assessee. In essence the Tribunal only estimated the possible profit out of purchases made through non genuine parties. The estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick could be adopted.

5.8 On consideration of the facts available on record it is seen that information uploaded by the State Sales Tax authorities wherein the said Department put up lists of parties found to be engaged in issuing false bills without actual sale of goods, was the point of genesis for enquiry related to possible bogus purchases in a number of cases. In case of a manufacturer, if the purchases are bogus, it must be possible to produce the goods as shown, even without use of materials, the purchase of which is suspicious. If it is not possible to produce the goods as

shown without consumption of these materials, these suspicious purchases cannot be held bogus unless production is also held bogus. Where purchase is held as bogus then the corresponding sales must also be held bogus as without the material being purchased, production/sales is not possible. Therefore, without the corresponding production/sales being held bogus, it cannot be a case of bogus purchases. In other words, in a case where the purchase is shown being bogus and it is not possible to complete the corresponding sale transaction without a genuine purchase of such material, the sale must also be bogus. However, if it is possible to complete the sales or the production as shown, even without the material involved in the suspicious purchases, it needs to be shown whether the sale transaction was effected or production was done even without using such material or whether such materials were also used. Unless it is shown that such materials were not used in corresponding sales or the production as shown, purchases cannot be held bogus and it will be a case of purchase from bogus parties. However if the material has been used in the sales, or as the case may be in production, it cannot be a case of bogus purchases. Rather it will be a case of purchase from bogus parties. Statements of hawala providers recorded by Sales Tax Authorities; affidavits filed by such suppliers before Sales Tax Authorities; absence of evidence in support of transportation/delivery of material etc., have been held less relevant as mere indicators and not decisive factors, to draw a conclusion regarding genuineness of purchases.

5.9 The suppliers were found to be engaged in providing bogus bill without actual dealing of goods. The appellant made payments for these purchases by account payee cheques duly cleared through normal banking channel; and are duly reflected in the appellant's bank statements. Before the AO, the appellant produced documentary evidence like copies of invoices and ledger accounts of the vendors in the appellant's books of account recording these purchases to substantiate the genuineness of these purchases. Since the sales receipts was not doubted or disputed by the AO and he has accepted the sales receipts of the appellant as it is, therefore, the AO cannot deny that purchases were not made by the appellant and the material was not used for its contract work. What is under dispute is the purchases from the parties from whom bills have been taken and cheques have been issued to them. Purchases are not in dispute but the parties from whom purchase are shown to have been made are disputed and suspicious.

5.10 The A.O. had made the addition as some of the suppliers were declared hawala dealers by the VAT Department. This may be a good reason for making further investigation but the AO did not make any further investigation and merely completed the assessment on suspicion. Once the assessee has brought on record the details of payments by account payee cheque, it was incumbent on the AO to have verified the payment details from the bank of the assessee and also from the bank of the suppliers to verify whether there was any immediate cash withdrawal from their account. No such exercise has been done or findings recorded. There was no detailed investigation made by the AO himself. It is also found that the payments have been made by account payee cheque which are duly reflected in the bank statement of the assessee. There is no evidence to show that the assessee has received cash book from the suppliers. Merely because the suppliers did not file some confirmation and documents, one cannot conclude that the purchases were not made by the assessee. This view is supported by the decision of Nikunj Eximp Enterprises vs. CIT 216 Taxman 171 (Bom). To this extent I am in view with the appellant, if appellant has fulfilled its onus making the payment by cheque and has supplied the addresses of the sellers then it cannot be presumed that supplier were bogus simply because the sellers were not found at the given address. There is a considerable time gap between the period of purchase transaction and period of scrutiny proceedings. The AO has not brought any material on record to show that there is suppression of sales. It is basic rule of accountancy as well as of taxation laws that profit from business cannot be ascertained without deducting cost of purchase from sales. Estimation of profit ranging from 12.5% to 15% has been upheld by the Hon'ble Gujarat High Court in the case of CIT vs. Simit P. Sheth 356 ITR 451 (Guj.) depending upon the nature of business.

5.9 Considering the totality of the facts before me, as well as the judicial opinion available, I am inclined to agree with the appellant's stand that the addition is excessive. The A.O. has disallowed the amount of Rs.51,56,867/- on account of bogus purchases. The total purchase debited to the trading account from these parties are Rs.51,56,867/-. I am of the view that estimation of profit at 12.5% would meet the ends of justice. Therefore, I direct the AO to estimate profit of 12.5% on the total purchases in question which works out to Rs.6,44,608/- (12.5% of Rs.51,56,867/-). The appellant therefore gets relief of Rs.

45,12,259/-fRs.51,56,867/- minus Rs.6,44,608/-). The grounds raised are partly allowed."

6. The Revenue is aggrieved by the appellate order passed by learned CIT(A) in upholding additions to the income of the assessee to the tune of 12.5% of the alleged bogus purchases instead of additions to the tune of 100% of alleged bogus purchases as were made by the AO , and Revenue has come in appeal before the tribunal , while on the other hand the assessee has accepted the appellate order passed by learned CIT(A) upholding additions to the tune of 12.5% of the alleged bogus purchases. The Ld. DR submitted before the Bench that the AO has made additions to the tune of 100% of the alleged bogus purchases , wherein the Ld. CIT(A) has restricted the said additions to the tune of 12.5% of the alleged bogus purchases. He relied upon the decision of Hon'ble Supreme Court in the case of N.K Proteins Limited v. DCIT in Special Leave to Appeal(C) CC No(s) 769 of 2017 vide orders dated 16-01-2017, reported in 2017-TIOL-23-SC-IT and prayed that additions to the tune of 100% of the alleged bogus purchases be upheld. The learned counsel for the assessee submitted that the AO made additions to the tune of 100% of alleged bogus purchases , while Ld. CIT(A) restricted the same to 12.5% of alleged bogus purchases. It was submitted by learned counsel for the assessee that the assessee has accepted the appellate order passed by learned CIT(A) and no appeal has been filed by the assessee with the tribunal against the decision of learned CIT(A) so as to end litigation. It was submitted by learned counsel for the assessee that assessee is trader in hardware and quantitative reconciliation of stock was duly submitted. The learned counsel for the assessee claimed that the assessee had filed quantitative reconciliation of stock before the AO and Ld. CIT(A) . The learned counsel for the assessee submitted copy of quantitative reconciliation of the stock before the Bench during the course of hearing , which is placed in file. The learned counsel for the assessee relied upon the appellate order passed by Mumbai-tribunal in the case of Harish K. Chandak v. ITO in ITA no.

3471 to 3473/Mum/2015 for ay: 2009-10 to 2011-12 vide common order dated 27.11.2018, wherein both of us were part of the Division Bench who pronounced the order in the case of Mr. Harish K. Chandak . It was claimed that on the same factual matrix , the tribunal upheld the additions to the tune of 12.5% of alleged bogus purchases . The learned counsel for the assessee also relied upon the decision of Hon'ble Bombay High Court in the case of The PCIT-17, Mumbai v. Mohommad Hazi Adam & Company in ITA no. 1004 of 2016 & Ors. , vide common judgment dated 11.02.2019 and prayers were made to uphold the appellate order passed by Ld. CIT(A), while on the other hand learned DR has prayed for sustaining assessment order passed by the AO.

7. We have considered rival contentions and perused the material on record including cited case laws. We have observed that assessee is a firm and is engaged in the business of manufacturing & supplying goods as per requirements of different railway workshop wherein it supplies engineering goods, consumables, hardware etc.. We have observed that the assessee filed its return of income on 08.09.2010 which was originally processed by Revenue u/s. 143(1) of the Act. It is observed that originally no scrutiny assessment was framed by Revenue against the assessee u/s 143(3) read with Section 143(2) of the 1961 Act. The AO received information that assessee is engaged into practice of inflating its purchases by taking accommodation entries through hawala parties. These parties are appearing in the list of suspicious dealers prepared by Maharashtra VAT department , wherein it is alleged that these parties had issued accommodation bills without actual delivery of goods. The AO received this tangible incriminating information from Sales Tax Department of Maharashtra Government through DGIT (Inv.), Mumbai vide letter bearing no. Corr. Field/DGIT (Inv)/2013-14 dated 20.01.2014 that these parties are indulging in providing accommodation entries wherein bogus purchases bills are obtained by the assessee without supplying of

material and the assessee is beneficiary of these alleged bogus purchases. The said information is also reported on Maharashtra Sales Tax web-site , the details of such alleged bogus purchases as were made by the assessee for year under consideration, are as under:

Sl. NO.	Name of the party	VAT No.	Transaction amount (In Rs.)
1	Alok Trading Co..	27440561142V	1,17,524
2.	Anlket Industries	27960621869V	8,09,923
3.	Mico Steels	27930713987V	8,75,477
4.	R.K. Matel	27340354975V	10,77,652
5.	Ujwal Enterprises	27940626827V	12,83,842
6.	Bohra Metal Industries	27190660365V	2,23,142
7.	Bhagyalaxml Steel Industries	27810631797V	7,69,307
		Total	51,56,867

The AO reopened the concluded assessment by invoking provisions of section 147 of 1961 Act, after recording reasons for reopening of the concluded assessment . Notice dated 25.02.2015 u/s. 148 was issued by the AO to the assessee , which was duly served on the assessee on 07.03.2015. Thus it can be seen that notice u/s. 148 was issued by AO within four years from the end of the assessment year and also originally no assessment was framed by AO u/s. 143(3) read with Section 143(2) of the Act , while return of income was originally processed u/s 143(1) of the 1961 Act. In order to verify genuineness of these purchases, the AO issued notices u/s. 133(6) of the 1961 Act to these aforesaid seven parties at the addresses furnished by the assessee but , however, the said notices were returned un-served by postal authorities with remarks 'left' and 'not known'. However , as is observed from the orders of authorities below, the assessee duly produced bills, proof of payments to seven parties through banking

channel and also evidences of quantitative reconciliation of these material purchased from these seven parties. The said quantitative reconciliation of stock was also filed before the Bench. At the same time it is an admitted position between rival parties that incriminating information was received by AO from Maharashtra VAT authorities that these parties are engaged in providing bogus accommodation entries and have admitted their indulgence as Hawala dealers. The assessee made purchases from these parties and the purchases are appearing in books of accounts of the assessee. The onus is on the assessee to prove genuineness of these purchases. The assessee could not produce these parties before the authorities below . The AO rejected books of accounts of the assessee u/s 145 and made additions to the tune of 100% of alleged bogus purchases. Based upon entire factual matrix of the case and relying on judicial precedents , the Ld. CIT(A) restricted the addition to 12.5% of the alleged bogus purchase being profits embedded in these purchases. The Ld. DR on the other hand is insisting on confirming additions to the tune of 100% of alleged bogus purchases by relying on decision of Hon'ble Supreme Court in the case of N.K Proteins(supra) . We have observed that in case of N K Proteins(Supra) , the facts were distinguishable as the tax payer on being searched by revenue u/s 132 of the 1961 Act in that case was found to be holding blank signed cheque books , blank bills etc of accommodation entry providers. But in the instant case the assessee has duly reconciled purchases allegedly made from bogus accommodation entry providers with sales made. The learned DR could not controvert this position. The assessee , however, was not able to produce these parties before the authorities below and moreover these parties admitted before Sales Tax authorities that they were indulging in providing bogus bills without supplying material . The assessee could not discharge onus as cast by the provisions of the 1961 Act. The assessee has duly accepted the additions as were sustained by Ld. CIT(A) to the tune of 12.5% of alleged bogus purchases to end litigation as no appeal/Co was filed by the assessee

challenging the additions as were confirmed/sustained by learned CIT(A). In such cases, profits embedded in these purchases are to be computed and such estimate has to be honest, fairs and reasonable because purchases are made from some other suppliers operating in grey market without bills while to complete books of accounts, the bills are obtained from the accommodation entry providers without taking physical delivery of material from these entry providers.The assessee in this process saves on taxes and costs which infact is profits embedded in these purchases which need to be brought to tax , which requires some guess work which should be honest, fair and reasonable guess work. We find that learned CIT(A) estimated profits embedded in these purchases to be 12.5% of alleged bogus purchases which cannot be termed as perverse or unconscionable. We are not inclined to interfere in the estimates by learned CIT(A) , which we hold to be reasonable and fair. The reference is drawn to decision of Hon'ble Supreme Court in the case of Kachwala Gems v. JCIT reported in(2007)288 IT 10(SC). Reference is also drawn to decision of Hon'ble Bombay High Court in the case of PCIT v. M/s Mohammad Haji Adam and Co. in ITA no. 1004 of 2016 & Ors. , vide judgment dated 11.02.2019. Reference is also drawn to decision of Hon'ble Bombay High Court in the case of Pooja Paper Trading Company Private Limited v. ITO reported in (2019)104 taxmann.com 95(Bom.). We have also observed that Mumbai Tribunal in the case of Harish K Chandak v. ITO in ITA no. 3471 to 3473/Mum/2015(to which both of us were part of DB who pronounced this order), vide order dated 27.11.2018 has upheld the additions to the tune of 12.5% of the alleged bogus purchases, by holding as under:-

> " *8. We have considered contentions of the Ld. DR and perused the material on record. We have observed that the assessee is engaged in the business of Rubber products, chemicals and compounds. The AO received information from Maharashtra Sales Tax Department as well from DGIT(Inv.), Mumbai that the assessee had made purchases from certain parties who are hawala dealers engaged in providing accommodation entries wherein*

bogus purchases bills were issued by these dealers without supplying any material. The Maharashtra Sales Tax Department made enquiries wherein it was concluded that these parties are hawala dealers engaged in issuing bogus invoices without supplying any material. The assessee is one of the beneficiaries of the bogus accommodation entries from these hawala dealers. The assessee has claimed to have made purchases from following parties who were listed as hawala dealers by Maharashtra Sales Tax department:-

S.No.	Name of the Party	TIN	PAN	Particulars of Transactions	
				A.Y.	Amount
1	D H TRADING CORPORATION	27580139600V	ACIPV6880A	2009-10	2,09,54,234/-
2	BS ENTERPRISES	27750288644V	ATBPS5210L	2009-10	2,23,54,706/-
3	NK TRADERS	27570136744V	AEDPC2617J	2009-10	2,27,26,384/-
21		Total			6,60,35,324/-

O also made inquiries u/s. 133(6) from all these three parties wherein notices sent were returned unserved by postal authorities as these parties were not traceable at the given addresses. The assessee did not furnish new addresses of these parties nor produced these parties before the AO . The assessee however had submitted details concerning these purchases before the AO. The assessee , however could not prove the movement of material purchased from these parties . The AO added 100% of the said purchases to the income of the assessee , while the Ld. CIT(A) considered the three years gross profit to determine the disallowance , wherein gross profit of the assessee was computed at Rs.35,11,220/- as against declared gross profit of Rs.33,31,662/-. The matter reached tribunal at the behest of Revenue also as the Revenue was also aggrieved by the appellate order passed by learned CIT(A) granting partial relief. We have observed that the tribunal in ITA no. 3578, 3659 & 3579/Mum/2015, AY 2009-10, 2010-11 & 2011-12 in Revenue's appeal for all these three years, vide common orders dated 11th July, 2017 has passed a well reasoned order , wherein the disallowance was restricted to 12.5% of such bogus purchases , wherein tribunal vide orders dated 11.07.2017 held as under:-

> *" These appeal have been filed by the Revenue against the orders of the CIT(A)-42, Mumbai dated 12.03.2015 for assessment years 2009-10 to 2011-12. Since common issues are involved in all these appeals, they are disposed off by this common order for the sake of convenience.*

2. The assessee has raised the following grounds for assessment years 2009-10 and 2011-12:-

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing the bogus purchases made by the assessee without appreciating the fact that the assessee failed to furnish documentary evidence to prove that purchase made were genuine.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) failed to appreciate the provisions of sections of section 69C of the Act which categorically states that where the assessee offers no explanation about the source of such expenditure or part thereof."

For A.Y. 2010-11 assessee has raised one more ground which reads as under: -

"3. On the facts and in the circumstances of the case, the Ld. CIT(A) failed to appreciate the provisions of Section 145 where there is a gross deviation in maintenance of accounts of the assessee and the same is not in conformity with the prescribed norms the assessee has failed to maintain and produce the books."

3. The brief facts of the case are that the assessee is an individual and is the proprietor of M/s. Giriraj Enterprises, engaged in the business of trading in Rubber & Rubber chemicals. The assessee made purchases from the following parties who were found to be hawala parties by the Sales Tax Department of the Government of Maharashtra: -

S.No.	Name of the Party	Amount
1	M/s. Balaji Traders	1,89,32,986/
2	M/s. Mahaveer Enterprises	1,54,90,497/-
3	M/s. Neeta Sales Corporation	54,69,269/-
4	M/s. Krsna Enterprises	1,89,16,208/-
5	M/s. Jain Corporation	20,61,330/-
	Total	6,08,70,272/-

The AO issued notice under section 133(6) to the above mentioned parties. However, the same was returned back. Therefore the AO has added the peak balance of Rs. 1,02,57,284/- (for A.Y. 2010-11) and made addition under section 69C of the I.T. Act. The AO has also added the GP @8% on the total bogus purchases.

4. The matter was carried to the CIT(A) and the CIT(A) has applied GP margin at 5.07% and restricted the addition to Rs. 30,86,720/-.

5. None appeared on behalf of the assessee. The learned D.R. submitted before that in the case of NK Proteins Ltd. vs. DCIT the Hon'ble Supreme Court has confirmed the addition on account of bogus purchases at 100% and similar view has been taken by the Hon'ble Gujarat High Court and applied GP @6%.

6. Having heard the learned D.R. we find that it is the case of Revenue that the assessee failed to discharge the onus of proving the purchases and could not produce evidence to show the actual delivery of material and could not produce confirmation letters from the alleged suppliers. However, we find that

the assessee is in possession of purchase invoices and payments are through banking channels. Therefore, if at all the purchases are found to be bogus we note that the sales turnover has not been disputed by the Revenue. Therefore, in such a case the addition can be made only on the profit element embedded in these purchase transactions to factorise the profit earned by the assessee against the purchase of material in gray market. We find that there are divergent views of various High Courts on what amount of GP should be applied in such bogus purchases. We find that in the case of Smith and Sheth the Hon'ble Gujarat High Court has held that a trader sold some goods and he would purchase the same from other sources. When the total sale is accepted by the AO he could not have questioned the very basis of purchase. Therefore purchases are not bogus but they are made from parties other than those who are mentioned in the books of account. This being the decision not the entire purchase price but only the profit element in such purchases can be added to the income of the assessee. We find that we are taking a consistent view that the disallowance to the extent of 12.5% of such bogus purchase will be justified in the facts of this case also. Therefore, we modify the order of the CIT(A) and direct the AO to restrict the disallowance the extent of 12.5% of such bogus purchases."

We have observed that the assessee has duly reconciled quantitative purchases with sales and the assessee is engaged in the trading activities. The assessee could not prove movement of material nor verification from these parties could be conducted. These parties are undisputedly listed as hawala dealers by Maharashtra Sales Tax department and on enquiries conducted by Maharashtra Sales Tax department, it was proved that these parties are hawala dealers issuing bogus accommodation bills without supplying any material. The assessee is beneficiary of these accommodation entries. The sales are however not doubted by Revenue and the assessee being trader has reconciled quantitative sale and purchase of goods dealt within by the assessee. Under these circumstances, only profit element embedded in such bogus purchases need to be brought to tax as income of the assessee which definitely involved guess work. The ratio of decision of Hon'ble Supreme Court in the case of Kachwala Gems v.JCIT reported in (2007) 288 ITR 10(SC) is applicable. We do not find any reason to deviate from well reasoned order passed by tribunal in Revenue appeal as detailed above, which we affirm/confirm. Thus the assessee's appeal for AY 2009-10 is disposed off by following the order dated 11.07.2017 passed by tribunal in revenue's appeal in assessee's own case for AY 2009-10,2010-11, 2011-12. Thus, we confirm additions to the tune of 12.5% of such bogus purchases for AY 209-10. The assessee appeal for AY 2009-10 stood dismissed. We order accordingly.

7.2 In our considered view keeping in view factual matrix of the case, there is no infirmity in the appellate order passed by Ld. CIT(A) estimating profits @12.5% of the alleged bogus purchases being profits

embedded in these purchases, as additional income to be brought to tax in the hands of the assessee, as some guess work is required in estimating profits embedded in these alleged bogus purchases but the said guess work has to be reasonable , fair and honest guess work . We find that there is not perversity in estimation made by learned CIT(A) nor it is unconscionable estimation and we are not inclined to interfere with appellate order passed by learned CIT(A), more-so the assessee has duly reconciled quantitative stocks reflected by these alleged purchases with sales made. The sales are not doubted by Revenue . The ratio of decision of Hon'ble Supreme Court in the case of Kachwala Gems v. JCIT(supra) supports our decision. Revenue fails in its appeal. We order accordingly.

8. Thus we do not find any merits in the appeal of the Revenue in ITA no. 3941/Mum/2017 for ay: 2010-11 which stand dismissed.

Order pronounced in the open court on 05.08.2019.

आदेश की घोषणा खुले न्यायालय में दिनांकः 05.08.2019 को की गई

Sd/-	Sd/-
(C.N PRASAD)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, dated: 05.08.2019

Nishant Verma
Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI