

M/s. Kedia Trading Company 401, Mehta Mahal 15, Mathew Road Opera House Mumbai – 400 004	Vs.	The Asst. Commissioner of Income Tax-18(2) 302, 3 rd Floor Earnest House, NCPA Marg Mumbai – 400 021
PAN/GIR No. AAAFK3968K		
(Appellant)	..	(Respondent)

2009-10 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-29, Mumbai in appeal No. CIT(A)-29/IT-121/AC.18(2)/14-15 & CIT(A)-29/IT-119/AC.18(2).14-15 respectively dated 21/10/2016 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 13/11/2014 by the Id. Asst. Commissioner of Income Tax – 14(2), Mumbai (hereinafter referred to as Id. AO). These cross appeals are taken up together and disposed off by this common order for the sake of convenience.

2. The only issue to be decided in the appeal of the revenue for the Asst Year 2007-08 is as to whether the Id CITA was justified in deleting the addition made towards Bogus Purchases in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee is engaged in the business of import, export and trading of cut and polished diamonds and rough diamonds. The assessment was reopened pursuant to the search conducted u/s 132 of the Act in the case of Bhanwarlal Jain Group wherein it was found that the group was engaging in providing accommodation entries of unsecured loans and bogus bills to various beneficiaries. As per the information received by the Id AO of the assessee from Director of Income Tax (Inv.) II, Mumbai , it was found that the assessee had obtained accommodation purchase bills / unsecured loans from following parties :-

Jewel Diam	Financial Year 2006-07	- Rs 81,14,182/-
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A2 Jewel	Financial Year 2006-07	- Rs 50,85,612/-
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Rs 1,31,99,794/-

3.1. The assessee pleaded that the Id AO had not provided the reason on what basis the Director of Income Tax (Inv.) II Mumbai had come to the conclusion that the said parties Jewel Diam and AW Jewel had been engaged in providing accommodation purchase bills / unsecured loans. The assessee had no transaction of whatsoever nature with Shri Bhanwarlal Jain or his family members. Even the statements recorded from Shri Bhanwarlal Jain and his family members do not mention the name of the assessee by stating that they or their concerns had supplied bogus accommodation bills to the assessee. Their statements did not establish their links with M/s Jewel Diam and M/s A2 Jewel. It was submitted that neither Mr Bhawarlal Jain and Mr Rajesh B Jian nor Mr Manish Jain was partner or proprietor of M/s Jewel Diam and A2 Jewel. The assessee dealt in these concerns through Mr Ritesh Siroya , partner of A2 Jewels and Mr Ghansjyam Vashisth , Proprietor of Jewel Diam. The assessee submitted that the concerns M/s Jewel Diam and M/s A2 Jewel were not related to Bhanwarlal Jain and the same was a third party. The assessee was asked to explain the loan transactions from Jewel Diam (Rs 81,14,182/-) and A2 Jewel (Rs 50,85,612/-). In response the assessee replied that the aforesaid figures represent purchases made by it from the two concerns and they are not unsecured loans. However, in the reason recorded, it was mentioned that the above purchase / unsecured loan represent bogus purchase / unsecured loan made only for the purpose of reducing income chargeable to tax. As such, there is no consistency between the reason recorded for initiation of reassessment proceeding and while dealing with the objections of the assessee. It was pleaded that if the purchases from these two parties are taken as loan, then there is

no question of reducing income chargeable to tax. At paragraph 11 of the letter issued to the assessee, the Id AO had mentioned as under:-

“Your explanation / contention is therefore , not acceptable and you are hereby requested to show cause as to why this amount of Rs 1,31,99,79/- shown as unsecured loan / purchases received from the above named two concerns should not be added back to your total income as undisclosed cash credit u/s 68 or unexplained cash investment u/s 69 of the Act.”

3.2. The assessee submitted that this clearly shows that the Id AO is not sure about the nature of transaction with the above named two parties. Since the assessee had shown the transaction with these two parties as purchases in the books of account, it cannot be taxed u/s 68 or 69 of the Act. Hence the reopening was challenged by the assessee on this count. However, the Id AO proceeded with the reassessment proceedings.

3.3. The assessee submitted the following details before the Id AO vide submissions dated 7.10.2014 :-

- a) Copy of purchase bills from M/s Jewel Diam and M/s A2 Jewel.
- b) Copy of ledger account of M/s Jewel Diam and M/s A2 Jewel.
- c) Copies of bank statements of the assessee showing the payment for purchases made to these two parties.
- d) Copy of stock register showing receipt of diamonds purchased from M/s Jewel Diam and M/s A2 Jewel.

3.4. It was submitted that the goods purchased from above two parties had been exported and quantitative tally thereof is duly given in the tax audit report u/s 44AB of the Act and the same perfectly tallies with the books of accounts of the assessee. The exports made by the assessee from the said purchases was through customs department who have verified and certified the quantity and price of the goods. The assessee also produced both the parties before the Id AO for examination who had duly confirmed the fact of supplying goods to the assessee. The assessee

produced the corresponding sales invoice evidencing the sale made out of aforesaid purchases. The Id AO sought to examine the genuineness and existence of these purchase parties by issuing notices u/s 133(6) of the Act which were duly replied by those two parties directly before the Id AO. This was in addition to producing themselves before the Id AO for examination. Both the parties produced the sales invoices, stock statements and their respective bank statements at the time of their physical presence before the Id AO. It was submitted by those two parties that the delivery of goods were acknowledged on the sale invoices itself. They also stated that they did not know Shri Bhanwarlal Jain or Shri Rajesh Jain and Shri Manish Jain and had no links with them.

3.5. Despite the above, the Id AO concluded that the purchases made by the assessee from the aforesaid concerns were not proved as the parties were found to be non-existent and proved by the investigation made by the investigation wing and enquiry conducted by the Ward Inspector that the concern was controlled by Shri Bhanwarlal Jain along with Shri Rajesh Jain and Shri Manish Jain to issue only accommodation entries. Hence the assessee had not substantiated the genuineness of purchases from the parties with cogent evidences . The Id AO further observed that the bills in the case of diamond jewelers have no description of quality, colour or size. The number of pieces sold is not mentioned. Only a mention of the carats could be seen in the invoices. Hence he concluded that the bills cannot be said to be genuine. Based on these observations, the Id AO completely disregarded the contentions of the assessee. Later he issued a fresh show cause notice dated 29.10.2014 directing him to explain why the peak of such purchases should not be considered for addition as this peak worked out amounted to the unexplained cash component invested by the assessee firm in making the various purchases in the grey market.

The assessee vide letter dated 2.11.2014 reiterated the fact that the purchases made by them are genuine from those two concerns and statement given by Shri Bhanwarlal Jain had been retracted by him vide his affidavit dated 15.5.2014 stating that the same was made involuntarily and under coercion. The Id AO however did not accept to this reply of the assessee. The Id AO further placed reliance on the various documents seized from the premises of Shri Bhanwarlal Jain and his group during his search u/s 132 of the Act and relied on their statements recorded on oath at the time of search and observed as under:-

“21. It is known market practice to make purchases in cash and to adjust such purchases against bogus purchase bills procured from bogus billers or hawala dealers. Payment by cheque is issued to such bogus billers, who return back the cash to the beneficiary / entry taker because there is no real transaction and hence, no payment is due to the bogus biller / hawala dealer. Considering the above facts of the case and the modus operandi adopted, where the goods are purchased from the grey market in cash, it is proved that the assessee has made unexplained cash purchases from the market.”

22 To summarize : A search action was conducted on Sh. Bhawarlal Jain group of cases by DGIT(Inv.), Mumbai on 03/10/2013. During the course of search action, incriminating documents were seized and statements u/s 132(4) was recorded from Bhawarlal Jain and several other persons who assist Sh. Bhawarlal Jain, wherein it was admitted by them that they, through their various benami concerns, were providing accommodation entries. The documents, details were analyzed by Mumbai investigation wing and vide letter dated 13/03/2014 it was intimated that the assessee firm, M/s. Kedia Trading Co. had taken accommodation entries of Rs. 1,31,99,794/- from Bhanwarlal Jain group from F.Y 2006-07 in the form of purchases from their benami concerns, M/s. Jewel Diam (Mr. Ritesh Siroya) (PAN: AAMFA7751J) of Rs.81,14,182/- and from M/s A2 Jewel, a proprietorship concern of Mr. Vashishta Ghanshyam A (PAN: ABUPV3494J) of Rs.50,85,612/-.

Since the assessee had not disclosed all the material facts fully and truly, necessary for assessment in respect of purchase made from above parties, permission was sought from the Commissioner of Income Tax -14. Mumbai to reopen the case. The same was granted vide letter dated 27/03/2014. Notices were issued reopening the cases for A.Ys2007-08 to 2012-13. In response to the notices, Shri. Suresh Anchaliya, CA attended

and furnished the details called for. He also produced the supplier parties for confirmation of purchases. Statements of the parties were recorded u/s 131. From, the foregoing paras it was proved that the purchases were accommodation entries obtained and actual purchases were from the grey market. Therefore the peak of the cash purchases were worked out for all the years and added back to the total income . Further, the commission element for procuring the accommodation bills is also considered and the same is worked out and added back.

23. In this case, total of such cash purchases is Rs. 1,31,99,794/-. This shows that during the year, cash to the tune of Rs.1,31,99,794/- was utilized to make such cash purchases. However, considering the possibility of repeated use of cash by sequential transactions of cash purchases and adjusting the same against taking of bogus bills and making cheque payments and subsequent receiving back of cash of the same amount, benefit is given to the assessee as payments have been made to the bogus billers and subsequently cash of the same amount has been received. For this, the peak of cash available with the assessee during the year was utilized for such repeated transactions. However, for the cash purchases to the tune of Rs.1,31,99,794/- the same does not apply. Therefore, it is clear that the peak of unaccounted cash was Rs. 1,13,99,794/- because goods of that amount were purchased in cash but no cheques were issued. Therefore, there was no question of receiving the cash back in repeated transaction for this amount. In the interest of justice, even after giving the benefit of principle of telescoping is given to the assessee for the amount of as the cash purchases for that amount might have been made from the peak cash available with the assessee at Rs.1,31,99,794/- . (Peak working attached as Annexure 'C)

23. From the discussion in the preceding para, there is no doubt that the purchases are not made from the parties from whom it is shown in the books of accounts. Further, reckoning the modus operandi enunciated above, details available on record and findings on record it is not difficult to understand the manner in which the whole transaction of bogus purchases has taken place. In any case, the onus is on the assessee to prove genuineness of purchases and parties from whom these purchases have shown to be made. The logical corollary the above fact leads to the conclusion that purchases are made from grey market by investing the assessee's own unaccounted cash for which the assessee has not offered any explanation regarding its nature and source. In view of the assessee's failure to furnish plausible explanation with cogent evidences, the provisions of section 69C are attracted on this amount. Accordingly, unexplained expenditure amounting to Rs. Rs.1,31,99,794/- in respect of which assessee has sought accommodation entries is disallowed and brought to tax."

KEDIA TRADING COMPANY						Per
DATE	COMPANY	TYPE	DR	CR	BALANCE	
10-05-2006	A2 JEWEL	PURCHASE ACCOUNT		2644464.00	2644464.00	
15-05-2006	JEWEL DIAM	PURCHASE ACCOUNT		5085612.00	7730076.00	
03-07-2006	A2 JEWEL	PURCHASE ACCOUNT		5469718.00	13199794.00	✓
11-08-2006	A2 JEWEL	UNION BANK OF INDIA	2644464.00		10555330.00	
26-09-2006	JEWEL DIAM	UNION BANK OF INDIA	5085612.00		5469718.00	
17-11-2006	A2 JEWEL	STATE BANK OF INDORE	2469718.00		3000000.00	
22-11-2006	A2 JEWEL	STANDARD CHARTERED BANK	3000000.00		0.00	
16-11-2007	KOTHARI & COMPANY	PURCHASE ACCOUNT		2405374.00	2405374.00	
28-02-2008	KOTHARI & COMPANY	STATE BANK OF INDORE	2405374.00		0.00	
03-05-2008	KOTHARI & COMPANY	PURCHASE ACCOUNT		11809198.00	11809198.00	
06-08-2008	MOULI GEMS	PURCHASE ACCOUNT		13090515.00	24899713.00	
09-08-2008	ROSE GEMS PRIVATE LIMITED	PURCHASE ACCOUNT		7608170.00	32507883.00	
12-08-2008	MERIDIAN GEMS	STATE BANK OF PATIALA	8400000.00		24107883.00	
12-08-2008	MERIDIAN GEMS	STATE BANK OF INDORE	10821395.00		13286488.00	
16-08-2008	MERIDIAN GEMS	PURCHASE ACCOUNT		13622070.00	26908558.00	
16-08-2008	MERIDIAN GEMS	PURCHASE ACCOUNT		19221395.00	46129953.00	
21-08-2008	KOTHARI & COMPANY	STATE BANK OF INDORE	10847984.00		35281969.00	
20-09-2008	ROSE GEMS PRIVATE LIMITED	STATE BANK OF INDORE	5000000.00		30281969.00	
20-09-2008	MERIDIAN GEMS	PURCHASE ACCOUNT		12337500.00	42619469.00	
26-09-2008	ROSE GEMS PRIVATE LIMITED	UNION BANK OF INDIA	1500000.00		41119469.00	
27-09-2008	MOULI GEMS	UNION BANK OF INDIA	5772313.00		35347156.00	
27-09-2008	MOULI GEMS	SYNDICATE BANK	4300000.00		31047156.00	
27-09-2008	ROSE GEMS PRIVATE LIMITED	SYNDICATE BANK	496209.00		30550947.00	
01-10-2008	MOULI GEMS	UNION BANK OF INDIA	1800000.00		28750947.00	
14-01-2009	KOTHARI & COMPANY	STATE BANK OF INDORE	961214.00		27789733.00	
14-01-2009	ROSE GEMS PRIVATE LIMITED	STATE BANK OF INDORE	611961.00		27177772.00	
04-03-2009	MERIDIAN GEMS	STATE BANK OF INDORE	1500000.00		25677772.00	

3.6. The Id AO also added the commission expenditure u/s 69C of the Act for obtaining bogus bills which was worked out at 0.1% on the total value of purchases of Rs 1,31,99,794/- for the Asst Year 2007-08. Accordingly, he made an addition towards commission of Rs 13,200/- in Asst Year 2007-08.

4. The Id AO by making similar observations made similar addition on peak of purchases also in respect of purchases made from the following parties during the Asst Year 2009-10 :-

M/s Kothari & Co	- Rs 1,18,09,198/-
M/s Meridian Gems	- Rs 4,51,80,965/-
M/s Mouli Gems	- Rs 1,30,90,515/-
M/s Rose Gems Pvt Ltd	- Rs 76,08,170/-

The Id AO by working out the peak of purchases as per table reflected hereinabove and after giving credit to peak addition made in Asst Year 2007-08, arrived at the peak addition of purchases to be made for the

Asst Year 2009-10 at Rs 3,29,30,159/- and added the same u/s 69C of the Act as unexplained expenditure. The Id AO also added the commission expenditure u/s 69C of the Act for obtaining bogus bills which was worked out at 0.1% on the total value of purchases of Rs 7,76,88,848/- for the Asst Year 2009-10. Accordingly, he made an addition towards commission of Rs 77,689/- in Asst Year 2009-10.

5. The Id CITA observed that the assessee had given the details of the purchases made from all the parties, the dates on which they have been made and the dates on which they were exported along with the export invoices. These are already forming part of records of the Id AO. To prove the genuineness of purchases, the assessee had furnished the purchase invoices, stock register, acknowledgement given on the sales invoice by the parties, affidavits given by the parties and other documents. The parties appeared before the Id AO and confirmed the supply of goods to the assessee. The Id CITA observed that the Id AO had placed her entire reliance on the statement given by Shri Bhanwarlal Jain that he also provides accommodation entries for purchases. Nowhere has he mentioned that he provided accommodation entry to the assessee. Similarly the parties who appeared before the Id AO nowhere confirmed that they had provided accommodation entries to the assessee. Shri Bhanwarlal Jain and other people who have given statements during the search have retracted their statements. The Id CITA observed that the Id AO had not explained anywhere in the order the relevance of Annexure B attached to the assessment order, even though the same is termed as a clinching documentary evidence by the Id AO to make the addition towards purchases made from the alleged disputed parties, whereas the names of these parties do not figure in the said Annexure. Moreover, the seized document of Shri Bhanwarlal Jain on which heavy reliance has

been placed by the Id AO relates to the period 1.1.2008 to 31.12.2008 and hence the same cannot be relied upon for making any addition for the Asst Year 2007-08. The Id CITA also noted that the Id AO took objection that the stock register is maintained carat wise and the details of the quality, cut and clarity of the diamond is not given and therefore it cannot be relied upon. However the assessee submitted that in this line of business, the stock register is maintained carat wise only. The Id CITA appreciated the reliance placed by the assessee on the decision of Mumbai Tribunal in the case of Sundaram Gems that maintaining carat wise stock register is a normal practice prevalent in diamond trade. This decision was later affirmed by the Hon'ble Jurisdictional High Court in the same case in Income Tax Appeal No. 6785 of 2010. With these observations, he proceeded to delete the addition made in the sum of Rs 1,31,99,794/- for the Asst Year 2007-08. The Id CITA correspondingly deleted the addition towards commission at 0.1% of disputed purchases for the Asst Year 2007-08. Aggrieved, the revenue is in appeal before us. The assessee has also preferred cross objection questioning the validity of reopening of assessment and on merits, supporting the order of Id CITA.

6. For the Asst Year 2009-10, the assessee submitted that the Id AO refers to the seized document of Shri Bhanwarlal Jain wherein she referred to entry dated 15.1.2009 in the name of CH.KC with an amount of 961.21 against it. She explains that this is the code name for M/s Kothari & Co and that the amount denotes Rs 9,61,210/- . This amount coincides with the data found on the Sony pen drive found in the premises of Shri Bhanwarlal Jain during the course of search action. Similarly, there is an entry dated 15.1.2009 in the name of CH.RGPL with an amount of 611.96 against it. This indicates the code name for M/s Rose Gems Pvt Ltd . This data also coincides with the data found on the

sony pen drive. The Id AO concluded that this establishes the assessee's relationship with Shri Bhanwarlal Jain. However, these figures are not tallying with the transactions made by the assessee with the said parties where both the purchase invoices as well as the export invoices are tallying. It was submitted that the Id AO also did not explain what these entries are except saying that CH.KC, CH.RGPL and CH.MG are code names for Kothari & Co, Rose Gems Pvt Ltd and Mouli Gems. She says these figures tally with the figures found in sony pen drive in the premises of Shri Bhanwarlal Jain and treats them as clinching evidence and assumes that these are cheque payments made by the assessee to Shri Bhanwarlal Jain and corresponding cash has also been received by the assessee. It was submitted that the Id AO presumed that the assessee had made cash purchases to the tune of Rs 7,76,88,848/- and worked out the peak credit at Rs 3,29,30,159/- and made an addition thereon.

7. The Id CITA observed for the Asst Year 2009-10 , the assessee during the course of assessment proceedings had submitted the following documents :-

- a) Ledger account of all parties in its books
- b) Copies of purchase bills
- c) Stock register / quantity details
- d) Bank statement duly marked
- e) Account confirmation
- f) Corresponding export bills
- g) One to one mapping chart for good purchases and subsequently sale through exports
- h) Quantitative tally chart
- i) ITR Acknowledgement and bank statement duly marked of purchase entries
- j) Affidavit of Kothari & Co, Mouli Gems , Rose Gems Pvt Ltd and Meridian Gems
- k) Requesting letter to purchase party to appear before the Id AO for verification of transaction
- l) Statement of gross profit for last 9 years showing consistency in gross profit

In addition to the above, the assessee produced all the purchase parties before the Id AO for examination wherein the Id AO had recorded statements from them. All the parties duly confirmed the fact of supply of goods to the assessee with relevant documentary evidences. The Id CITA appreciated the various evidences submitted by the assessee as well as by the disputed parties before the Id AO and made similar observations as was made for the Asst Year 2007-08 and deleted the addition for the Asst Year 2009-10 in the sum of Rs 3,29,30,159/-. The Id CITA correspondingly deleted the addition towards commission at 0.1% of disputed purchases for the Asst Year 2009-10. Aggrieved, the revenue is in appeal before us. The assessee has also preferred cross objection questioning the validity of reopening of assessment and on merits, supporting the order of Id CITA.

8. We have heard the rival submissions and perused the materials on record. At the outset, the Id AR placed on record the seized document which was heavily relied upon by the Id AO for framing the addition for both the Asst Years 2007-08 and 2009-10 by adding the peak value of purchases. We find from the said document seized from the premises of Shri Bhanwarlal Jain during his search action, it relates to the period 1.1.2008 to 31.12.2008. Hence the same in any case , cannot be used against the assessee for framing addition for the Asst Year 2007-08. The various documentary evidences supporting the purchases actually made by the assessee with corresponding linking of export sales supported by stock register, quantitative tally , affidavits from parties etc are not in dispute before us. Infact the assessee had made export sales which could be done only after due verification of the necessary documents by the customs authorities and by following due procedure thereon. There is

no dispute that the assessee had received the export proceeds thereon. Moreover, all the disputed parties presented themselves before the Id AO for examination with necessary documents wherein they had duly confirmed the fact of supply of goods to the assessee during the relevant period together with its value and a statement was recorded from them by the Id AO in that regard. In these circumstances, merely by placing reliance on the seized document of Shri Bhanwarlal Jain which apparently pertains to the different period (i.e 1.1.2008 to 31.12.2008) , no addition could be made in the hands of the assessee for the Asst Year 2007-08. Moreover, we find that the Id AO had made addition by considering the peak credit of purchases. The theory of peak credit could be used only when the transactions are carried out outside the books. In the instant case, the entire purchase transactions are duly reflected in the regular books of accounts of the assessee and payments for the same were made by account payee cheques from disclosed sources. Hence the peak credit theory cannot be made applicable and the addition deserves to be deleted on this count.

8.1. Moreover, the addition has been made by the Id AO u/s 69C of the Act. The basic principle of section 69C of the Act is that the incurrance of an expenditure is not in dispute whereas the source for such expenditure is in dispute. In the instant case, since the addition is made u/s 69C of the Act, it could be safely concluded that the purchases has been accepted as genuine by the Id AO and only the source is disputed. We find that the source for such purchases have been explained from the regular books of accounts by making payment by account payee cheques. Hence there cannot be any addition u/s 69C of the Act. Hence the addition deserves to be deleted on that count also.

8.2. In view of deletion of addition made on account of alleged disputed purchases, correspondingly, the addition made towards commission at 0.1% also requires to be deleted which was rightly deleted by the Id CITA.

9. For the Asst Year 2009-10, we find that the various documentary evidences supporting the purchases actually made by the assessee with corresponding linking of export sales supported by stock register, quantitative tally, affidavits from parties etc are not in dispute before us. Infact the assessee had made export sales which could be done only after due verification of the necessary documents by the customs authorities and by following due procedure thereon. There is no dispute that the assessee had received the export proceeds thereon. Moreover, all the disputed parties presented themselves before the Id AO for examination with necessary documents wherein they had duly confirmed the fact of supply of goods to the assessee during the relevant period together with its value and a statement was recorded from them by the Id AO in that regard. We find that the Id CITA had elaborately dealt with the issue in dispute for the Asst Year 2009-10 by observing as under:-

4.3. The submission filed by the learned counsel have been carefully considered and there is sufficient force in the same. It is the strong contention of the appellant that the purchases made are all genuine and the same were exported. The learned counsel has given the details of the purchases made from all the four parties, the dates on which they have been made and the dates on which they were exported alongwith the export invoices. This is a part of the record. To prove the genuineness of the purchases, the appellant had furnished the purchase invoices, stock register, acknowledgement given on the sales invoices by all the four parties, affidavits given by all the four parties and other documents. In fact, all the parties appeared before the assessing office and confirmed the purchases by way of the statement given under oath.

4.3.1. *The assessing officer has placed her entire reliance on the statement given by Shri Bhawarlal Jain that he also provides accommodation entries for purchases. Nowhere has he mentioned that he provided accommodation entry to the appellant. Similarly, the parties have not confirmed anywhere that they have provided accommodation entries. Shri Bhanwarlal Jain and the other people who have given statements during the search have retracted their statements. The assessing officer has not explained anywhere the order the relevance of annexure B attached to the assessment order. She terms it as clinching documentary evidence to make the addition of purchases made from the parties. She explains a few entries and states that the figures coincide with the data found in the sony pen drive. But these figures do not have any correlation with the purchases made by the appellant from the abovementioned four parties. As already mentioned, the appellant expresses ignorance about this paper and says he is not aware how these entries are made by Shri Bhanwarlal Jain and disowns the same by stating that nothing has been found either in his premises or in the premises of the aforementioned four parties. None of the parties have confirmed providing accommodation entries to the appellant nor did Shri Bhanwarlal Jain mentioned the appellant in any of his statements. On the other hand, all the parties from whom the purchases have been made have not only filed affidavits but have appeared before the assessing officer and have confirmed the purchases. All of them file income tax returns regularly and are assessee to tax. The assessee has produced his stock register and had shown the entries of the purchases made and the corresponding exports of the same. The assessing officer also took objection that the stock register is maintained carat wise and the details of the quality cut and clarity of the diamonds is not given, therefore, it cannot be relied upon. However the assessee submitted that in this line of business the stock register is maintained carat wise only. The Hon'ble ITAT Mumbai, has held in the case of Sundaram gems that maintaining carat wise stock register is a normal practice prevalent in Diamond trade. This view has been affirmed by the jurisdictional High Court in the same case i.e. Sundaram gems Private Ltd., Income Tax appeal Number 6785 of 2010.*

4.3.2. *To summarise, the appellant has produced evidences to show that he had actually made purchases from the four parties and has established the corresponding sale through export with the individual invoices. The payments for purchases have been made in cheque and are through proper banking channels. This has been evidenced by the bank statements of both the appellant and the four parties from whom the purchases were made. All the parties have confirmed the sales made by them to the appellant not only by way of affidavits but by also appearing before the AO and giving statements under oath confirming the transactions. Thus, the appellant has discharged the primary onus cast upon him to prove the genuineness of the purchases. Thereafter, the onus shifts to the AO to prove the evidence furnished by the appellant, wrong. The assessing Officer has not done anything to controvert the evidences furnished by the appellant. She merely*

placed her reliance on the statements of Shri Bhanwarlal Jain who has stated that he also given accommodation entries. He has never stated that all the transactions made by them are accommodation entries nor did he mentioned the name of the appellant as a party to whom accommodation entries were provided. The AO presumed that the purchases made by the appellant from the four parties mentioned supra as accommodation entries merely because they were concerns controlled by Shri Bhanwarlal Jain. No evidence what so ever has been brought on record by her to prove that the purchase made are not genuine and are mere accommodation entries.

4.3.3. The appellant has requested the assessing officer to provide for the cross examination of Shri Bhanwarlal Jain on whose statement she has completely placed reliance. But this was denied to him. The Hon'ble Apex Court in the case of Andaman Timber Industries in CIVIL APPEAL NO.4228 of 2006 held as under:-

“According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-

examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice.

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.”

4.3.4. The Hon'ble High Court of Mumbai in the case of H.R. Mehta vs. ACIT ITA No.58 of 2001 in the judgment delivered on 30.06/2016 held as under:-

“In M/s. Andaman Timer Industries, the Supreme Court found that the adjudication authorities has not granted an opportunity to the assessee to cross examine the witness and the tribunal merely observed that the cross examination of the dealers in that case, could not have brought out any material which would not otherwise be in possession of the appellant. The Supreme Court set aside the impugned order and observed that it was not for the adjudicating authority to the adjudicating authority to presuppose as to what could be the subject matter of the cross examination and make the remarks such as was done in that case. In the instant case, although the appellant has called upon us to draw an inference that the burden shifted to the revenue in the present case, once it was established that the payments were made and repaid by cheque, be need not hasten and adopt that view after giving out through to various issue raised and the decisions cited by Mr. Tralshawalla and finding that on a very fundamental aspect, the revenue was not justified in making an addition at the time of reassessment without having first given the assessee an opportunity to cross examine the deponent on the statements relied upon by the ACIT, Quite apart from denial of an opportunity of cross examination, the revenue did not even prove the material on the basis of which the department sought to conclude that the loan was a bogus transaction.

4.3.5. In our view in the light of the fact that the monies were advanced apparently by the account payee cheque and was repaid vide account payee cheque, the lease that the revenue should have done was to grant an

opportunity to the assessee to meet the case against him by providing the material sought to be used against assessee in arriving before passing the order of re-assessment. This not having done, the denial of such opportunity goes to the root of the matter and strikes at the very foundation of the reassessment and therefore renders the orders passed by the CIT(A) and the Tribunal vulnerable. In our view, the assessee was ought to be provided with the material used against him apart from being permitting him to cross examine the deponents. Despite the request dated 15.02. 1996, seeking an opportunity to cross examine the deponent and furnish the assessee with copies of statement and disclose material, these were denied to him. In this view of the matter, we are inclined to allow the appeal on this very issue."

4.3.6. In this case, the appellant vide his letter date 07.10.2014 addressed to the AO requested her to provide copy of the statement on the basis of which she has reopened the case. Request for cross examination of Shri Bhanwarlal Jain was also made. However, the AO neither gave copies of the material on which reliance was placed nor afforded an opportunity of cross examination. Following the ratio of jurisdictional High Court discussion supra in the case of H.R. Mehta, the appeal can be allowed on this ground alone.

4.3.7. The assessing officer has made the additions on two grounds: 1. That Shri Bhawarlal Jain has admitted in the statement under oath that he provides accommodation entries to the concerns controlled by him and; (2) the paper found in the premises of Shri Bhawarlal Jain which she attached as annexure B to the assessment order. However, Shri Bhawarlal Jain has nowhere mentioned that he has given accommodation entries to the appellant. The paper mentioned as annexure B to the assessment order has some entries which the AO tried to explain as code words for the parties. However, the figures given in the paper could not be co-related to the transactions made by the appellant with the aforesaid four parties. As already discussed, the appellant has completely disowned the paper as it was not found either in his premises or in the premises of the purchase parties. Apparently, this pertains to the period 1/1/2018 to 31/12/2018. The assessing officer has not explained the relevance of this paper. She merely says the information in the paper tallies with the information in the pen drive found at the premises of Shri Bhawarlal Jain. How this proves that the appellant has taken accommodation entries from Mouli Gems, Rose Gems Pvt. Ltd. Kothari and Co., and Meridian Gems and how the cheques were given by the appellant and cash received back has not been brought on record by the AO that the appellant has received cash from these four parties. It appears that the reliance placed by the AO on the statement of Shri Bhanwarlal Jain and the paper attached as Annexure-B to the assessment order is misplaced.

4.3.8. In view of the above discussion, the addition made by the assessing Officer of Rs.3,29,30,159/- cannot be sustained and is directed to be deleted. This ground of appeal is allowed.

9.1. Moreover, we find that the Id AO had placed heavy reliance on the seized document of Shri Bhanwarlal Jain relating to the period 1.1.2008 to 31.12.2008 for making addition in the hands of the assessee. But we find from Annexure C to the assessment order which contains the workings of peak credit for purchases, those are transactions of purchases made by the assessee and payments made by the assessee to the disputed parties. We find that those transactions are not at all reflected in the seized document of Shri Bhanwarlal Jain. Hence the entire allegations of the Id AO vanishes on this count itself as no addition has been made by the Id AO using the contents of the said seized document for the period 1.1.2008 to 31.12.2008.

9.2. We find that the Id AO had made addition by considering the peak credit of purchases. The theory of peak credit could be used only when the transactions are carried out outside the books. In the instant case, the entire purchase transactions are duly reflected in the regular books of accounts of the assessee and payments for the same were made by account payee cheques from disclosed sources. Hence the peak credit theory cannot be made applicable and the addition deserves to be deleted on this count.

9.3. Moreover, the addition has been made by the Id AO u/s 69C of the Act. The basic principle of section 69C of the Act is that the incurrence of an expenditure is not in dispute whereas the source for such expenditure is in dispute. In the instant case, since the addition is made u/s 69C of the Act, it could be safely concluded that the purchases has been

accepted as genuine by the Id AO and only the source is disputed. We find that the source for such purchases have been explained from the regular books of accounts by making payment by account payee cheques. Hence there cannot be any addition u/s 69C of the Act. Hence the addition deserves to be deleted on that count also.

9.4. In view of aforesaid observations, we hold that the addition made in the hands of assessee for the Asst Year 2009-10 deserves to be deleted for more than one reason as could be evident from above and has been rightly deleted by the Id CITA.

9.5. In view of deletion of addition made on account of alleged disputed purchases, correspondingly, the addition made towards commission at 0.1% also requires to be deleted which was rightly deleted by the Id CITA.

10. The Cross Objections preferred by the assessee for the Asst Years 2007-08 and 2009-10 were stated to be not pressed by the Id AR at the time of hearing. The same is reckoned as a statement made from the Bar and accordingly the same is dismissed as not pressed for both the years.

11. In the result, the appeals of the revenue are dismissed and cross objections of the assessee are dismissed.

Order pronounced in the open court on this 02/08/2019

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 02/08/2019

KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai