

IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI
BEFORE SHRI R. C. SHARMA, AM AND SHRI AMARJIT SINGH, JM

I.T.A. Nos. 277/M/2017 & 797/M/2017

Assessment Years: 2009-10 & 2010-11)

Prabhat Gupta Flat No. 802, Chhadva Residency, N.B. Patil Marg, Chembur (E), Mumbai- 400071	Vs.	ITO Circle-27(2)(5) Mumbai, (erstwhile Income-tax Officer, 21(2)(2), Mumbai.
स्थायीलेखासं. / जीआइआरसं. / PAN/GIR No. : AAFPG6605C		
(Appellant)	..	(Respondent)

I.T.A. Nos.7574/M/2016 & 531/M/2017

Assessment Years: 2009-10 & 2010-11)

ITO Circle-27(2)(5) Mumbai, (erstwhile Income- tax Officer, 21(2)(2), Mumbai.	Vs.	Prabhat Gupta Flat No. 802, Chhadva Residency, N.B. Patil Marg, Chembur (E), Mumbai- 400071
स्थायीलेखासं. / जीआइआरसं. / PAN/GIR No. : AAFPG6605C		
(Appellant)	..	(Respondent)

Assessee by:	Shri Sashank Dundu
Department by:	Ms Pooja Swaroop

Date of Hearing: 21.11.2017
Date of Pronouncement: 21.12.2017

ORDER

PER AMARJIT SINGH, JM:

The assessee as well as the revenue have filed the above mentioned appeals against the different order passed by the Commissioner of Income Tax (Appeals)-38, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the assessment years 2009-10, 2010-11.

ITA NO.277/M/2017 & 7574/M/2016:-

2. The assessee as well as revenue have filed the above mentioned appeals against the order dated 19.09.2016 passed by the Commissioner of Income Tax (Appeals)-38 Mumbai, [hereinafter referred to as the "CIT(A)"] relevant to the assessment years 2009-10.

3. The assessee has raised the following grounds:-

"1. The order passed by the Ld. CIT(A)-38, Mumbai(hereinafter referred to as the Ld. CIT(A) is bad in law and on facts.

2. Reassessment is bad in law and void ab initio:

2.1 The Ld. CIT(A) erred in upholding the reassessment order passed by the Assessing Officer which is bad in law and void ab initio as it is based on conjectures and surmises without there being concrete reason that the income has escaped the assessment.

3. Disallowance of 12.5% of certain purchases alleged to be bogus in nature.

3.1 The Ld. CIT(A) grossly erred in making a disallowance of 12.5% made by the AO in respect of purchases alleged to be bogus in nature based on the information received the Sales Tax Department, without considering the strong evidence and details submissions given by the appellant.

- 3.2 *The Ld. CIT(A) partly upheld the disallowance made by the Assessing Officer without appreciating that the non-payment of VAT by the seller should nor form the basis of disallowance of genuine purchases.*
- 3.3 *The Ld. CIT(A) grossly erred in disallowing 12.5% of the alleged purchases which is arbitrary and has no basis, even when the evidence s and records submitted by the appellant as well as the corresponding sales to the alleged purchases were not disputed and were duly accepted by both the Assessing Officer and the Ld. CIT(A).*
- 3.4 *Without prejudice to the above, the amount of disallowance ought to be restricted to 2.05% being the gross profit margin earned by the appellant during the assessment year.*
- 4 *Disallowance of 10% of business expenses treating them as personal in nature.***
- 4.1 *The Ld. CIT(A) grossly erred in upholding the disallowance made on estimation basis by the AO in respect of business expenses at 10% of the total expenditure treating them to be p personal in nature without any specific evidence.*
5. *The appellant craves leave to add to, alter, amend or withdraw all or any of the foregoing grounds of appeal at or before the hearing of this appeal.”*

4. The revenue has raised the following grounds:-

“1. On the facts and circumstances of the case the Ld. CIT(A) erred in deleting the addition of Rs.3,63,04,869/- on account of bogus purchases.

2. On the facts and circumstances of the case, the Ld. CIT(A) erred in not considering the fact that the assessee was unable to prove the genuineness of the purchases and has failed to produce the hawala parties for examination before the AO despite having been given the opportunity and time to do so.

3. On the facts and circumstances of the case, the Ld. CIT(A) failed to appreciate the fact that the details furnished by the assessee are of the nature of secondary evidence and no

primary evidence in the form of producing the relevant parties has been filed to prove the genuineness of the purchase.

4. The Ld. CIT(A) has failed to appreciate the finding of the Assessing Officer that the purchases have been made out of undisclosed income and the same remained unexplained which required to be added u/s 69C of the I.T. Act.

5. On the facts and circumstances of the case, the Ld. CIT(A) erred in sustaining the addition to the extent of Rs.51,86,410/- by taking the GP @ 12.5% of the bogus purchases of Rs.4,14,91,279/- not considering the facts that the entire purchases are bogus.

6. The appellant prays that the order of the CIT(A) on the above grounds be reversed and that of the Assessing Officer be restored.

7. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.”

5. The brief facts of the case are that the assessee filed his return of income for the A.Y. 2009-10 on 27.09.2009 declaring total income to the tune of Rs.6,07,580/-. The return was processed u/s 143(1) of the I.T. Act. Thereafter, an information was received from DGIT(Inv.), Mumbai which was forwarded by virtue of letter no. CIT-21/H.Qrs/Sales Tax Infor/2012-13 26.02.2013 in which it was conveyed that the assessee has taken the accommodation entries from various parties without any actual dealing, the assessee received the accommodation entries from the following 20 parties.:-

S no.	Name of the bill provider	Tin No.	Amount
1	Dhruv Sales Corporation	27760622173V	14,07,177
2	Sachi Mercantile P. Ltd.	27770610285V	19,23,724

3	J B Interlink	27800298365V	24,70,753
4	P.K. Trading company	27830258239V	26,74,095
5	K.K. Trading Company	27960673085V	7,03,162
6	Vitarag Trading Company	27830385697V	23,74,939
7	Bhumi Enterprise	27860587392V	9,77,485
8	Prayan Trading Company	27740535951V	25,91,461
9	Surachi Multitrade P. Ltd.	27200610259V	15,03,623
10	Hariom Traders	27840642014V	11,47,141
11	Sampark Steels	27170360840V	23,23,571
12	N B Enterprises	27490339033V	24,81,579
13	Bhagwati Trading Company	27020614820V	21,66,542
14	Revika Trade Impex P. Ltd.	27730562486V	34,06,054
15	Sivamani Traders P. Ltd.	27290589500V	11,81,472
16	Newspark trading co. p. ltd.	27530399248V	20,00,170,
17	Anshu Merchantile P. Ltd.	27540680106V	32,22,111
18	Omkar Trading Company	27600606547V	27,61,268
19	Jindal Steel Corporation	27650564276V	30,29,299
20	Atlas Enterprises	27710363744V	11,45,653
			4,14,91,279

6. The statement of above mentioned parties were recorded by the Sales Tax Department in which they admitted that they were providing accommodation entries to the assessee. The assessee above facts speaks that there was an inflation of expenditure resulting in escapement of income to the extent of Rs.4,14,91,279/- for the A.Y. 2009-10 in the case of assessee. Thereafter, the notice u/s 148 of the Act was issued and served upon the assessee. In pursuance of notice, the assessee filed the return of income which he had already filed earlier on 27.09.2009. Thereafter, notice u/s 143(2) of the Act dated 22.08.2013 and notice u/s 142(1) of the I.T. Act. 07.10.2013 were issued and served upon the assessee. The assessee is a proprietor of M/s. Sumeet Steel Traders which is engaged in the business of Trading of TMT Bars, Steel Etc. During the year under consideration, the assessee has declared to the profit of Rs.6,81,392/-. After adding back disallowable expenses, the assessee has declared income from other sources amounting to the tune of Rs.15,092/- by way of bank interest, interest on Dep., NSC and Bond interest. After availing deduction u/s 80C and u/s 80D and u/s 80G of the Act of Rs.1,22,118/- total income to the tune of Rs.6,07,580/-. After deduction u/s 80C and u/s 80D and u/s 80G of the Act of Rs.1,22,118/-, the assessee has offered to Rs. 6,07,580/- for taxation. The assessee showed the gross profit of Rs.39,16,186/- ratio @ 2.05% and net profit of Rs.6,81,392/- i.e., showing net profit ratio 0.357% on total turnover of Rs.19,08,05,080/-. The gross profit and net profit

ratio declared in immediately preceding year was at Rs. 27,86,014/- i.e., 1.99% and Rs.5,92,771/- i.e., 0.42% on total turnover of Rs.13,95,75,233/- respectively. During the course of assessment proceeding the matter of controversy in connection with the reopening of the case has been decided and the assessee also contested the case on merits by providing the documents available with him but the Assessing Officer was not satisfied, therefore, the bogus purchase to the tune of Rs.4,14,91,279/- was added to the income of the assessee. The assessee filed an appeal before the CIT(A) who restricted the claim of the assessee to the extent of 12.5% of the bogus purchase. The assessee was not satisfied, therefore, filed the present appeal before us. However, the revenue has also filed an appeal in which the contention of the revenue is that whole addition of bogus purchase is liable to be added to the income of the assessee.

ISSUE NO.1:-

7. Issue no. 1 is generally in nature which nowhere required any adjudication.

ISSUE NO.2:-

8. At the time of argument the assessee did not press this issue, therefore, this issue is being decided in favour of the revenue against the assessee.

ISSUE NO.3:-

9. Under this issue the assessee has challenged the addition confirmed by CIT(A) @ 12.5% of the bogus purchase. The Ld. Representative of the assessee has argued that the Assessing Officer has raised the addition on the basis of the information received by the DGIT(Inv.), Mumbai in connection with the purchase from 20 parties total to the tune of Rs.4,14,91,279/- but the evidence adduced by assessee has not been considered by the AO as well as CIT(A), therefore, the order passed by the CIT(A) is wrong against law and facts and is liable to be set aside. It is also argued that that in the year of consideration the gross profit ratio of the assessee was @ 2.05% and in the immediate prescribing year the gross profit was @ 1.99%, therefore, at the time of assessing the profit embedded in the bogus purchase the ratio @ 2% is liable to be considered in the interest of justice. In support of this contention the Ld. Representative of the assessee has placed reliance upon in law settled in **Vijay Protein Vs. CIT 58 ITT 458 (Ahd) and CIT Vs. Simit P Sheth 356 ITR 451 (Gujrat High Court)**. It is also argued that the non service of notice in view of provision u/s 133(6) of the Act nowhere effect the claim of the assessee when the claim of the assessee has duly been proved on record by adducing sufficient evidence on record. In support of this contention the Ld. Representative of the assessee has placed reliance upon law settled in **CIT Vs. M/s. Nikunj Eximp Enterprises P. Ltd. 2016 taxman.com 171 (Bombay High Court)**. On the other hand, the Ld. Representative of the Department has refuted the said

contention and argued that the whole bogus purchase is required to be added to the income of the assessee. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. The Assessing Officer reopened the case of the assessee on the basis of the information received from DGIT(Inv.), Mumbai by virtue of letter dated 26.02.2013. The said letter conveyed the transaction of 20 parties bogus in nature with the assessee. It is alleged that the purchase of the assessee from the said party is bogus in nature. The Assessing Officer issued the notices to the said parties but the notices u/s 133(6) of the Act were not served. However, the Assessing Officer also tried to serve the notice through Tax Inspector but the parties were not found at the given address. Thereafter, the Assessing Officer raised the whole addition of purchases as income of the assessee. On appeal, CIT(A) has confirmed the said addition. On appraisal of both the orders we noticed that the Assessing Officer as well as CIT(A) nowhere took into consideration the evidence adduced by the assessee. It is to be seen what was the evidence given by assessee during the proceeding in connection with above mentioned 20 parties. The evidence which has been given by the assessee is being discussed below party-wise.

1. Dhruv Sales Corporation:- The assessee given the ledger A/c. which lies at page no. 157 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at

page no. 158 of the paper book. The assessee has also submitted the MVAT Challan which lies at page no. 159 of the paper book. The assessee has also furnished the invoices of purchase and sales along with delivery challans which lies at page no. 160-165 of the paper book.

2. Sachi Merchantile P. Ltd.:- The assessee given the ledger A/c. which lies at page no. 340 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 341 of the paper book. The assessee has also submitted the MVAT challan which lies at page no. 342-344 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 345-359 of the paper book.

3. J. B. Intrlink.:- The assessee has given the ledger A/c. which lies at page no. 323 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 324 of the paper book. The assessee has also submitted the MVAT challan which lies at page no. 325-326 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 327-339 of the paper book.

- 4. P. K. Trading:-** The assessee has given the ledger A/c. which lies at page no. 300 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 301 of the paper book. The assessee has also submitted the MVAT challan which lies at page no. 302-304 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 305-322 of the paper book.
- 5. K. K. Trading Co.:-** The assessee has given the ledger A/c. which lies at page no. 260 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 261 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 262-267 of the paper book.
- 6. Vitarag Trading Co.:-** The assessee has given the ledger A/c. which lies at page no. 283 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 284 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 285-299 of the paper book.
- 7. Bhumi Enterprises.:-** The assessee has given the ledger A/c. which lies at page no. 148 of the paper book. The assessee has

also submitted the confirmation of account by the supplier which lies at page no. 149 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 150-156 of the paper book.

8. Prayan Trading Co.:- The assessee has given the ledger A/c. which lies at page no. 360 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 361 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 362-377 of the paper book.

9. Surachi Multitrade P. Ltd. :- The assessee has given the ledger A/c. which lies at page no. 449 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 450 of the paper book. The assessee has also submitted the MVAT challan which lies at page no. 451 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 452-462 of the paper book.

10. Hari Om Traders. :-The assessee has given the ledger A/c. which lies at page no. 268 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 269 of the paper book. The assessee has also submitted

the acknowledgements of VAT return which lies at page no. 270 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 271-282 of the paper book.

- 11. Sampark Steel. :-**The assessee has given the ledger A/c. which lies at page no. 463 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 464 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 465-480 of the paper book.
- 12. N. B. Enterprises.:-** The assessee has given the ledger A/c. which lies at page no. 428 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 429 of the paper book. The assessee has also submitted the MVAT challan which lies at page no. 430-431 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 432-448 of the paper book.
- 13. Bhagwati Trading Co.:-** The assessee has given the ledger A/c. which lies at page no. 226 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 227 of the paper book. The assessee has also

submitted the MVAT challan which lies at page no. 228-248 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 249-259 of the paper book.

14. Revika Trade Impex P. Ltd.:- The assessee has given the ledger A/c. which lies at page no. 166 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 167 of the paper book. The assessee has also submitted the MVAT challan which lies at page no. 168-169 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 171-186 of the paper book.

15. Siva Nabu Traders P. Ltd.:- The assessee has given the ledger A/c. which lies at page no. 135 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 136 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 137-147 of the paper book.

16. New Spart Trading Co. P. Ltd.:- The assessee has given the ledger A/c. which lies at page no. 206 of the paper book. The assessee has also submitted the confirmation of account by the

supplier which lies at page no. 207 of the paper book. The assessee has also submitted the MVAT challan which lies at page no. 208-209 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 210-225 of the paper book.

17. Anshu Merchantile P. Ltd.:- The assessee has given the ledger A/c. which lies at page no. 413 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 414 of the paper book. The assessee has also submitted the MVAT challan which lies at page no. 415 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 416-427 of the paper book.

18. Omkar Trading Co.:- The assessee has given the ledger A/c. which lies at page no. 395 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 396 of the paper book. The assessee has also submitted the MVAT challan which lies at page no. 397 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 398-412 of the paper book.

19. Jindal Steel Corporation.:- The assessee has given the ledger A/c. which lies at page no. 187 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 188 of the paper book. The assessee has also submitted the MVAT challan which lies at page no. 189 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 192-205 of the paper book.

20. Atlas Enterprises.:- The assessee has given the ledger A/c. which lies at page no. 378 of the paper book. The assessee has also submitted the confirmation of account by the supplier which lies at page no. 379 of the paper book. The assessee has also submitted the MVAT challan which lies at page no. 380-383 of the paper book. The assessee has also submitted the Purchase and Sales invoices along with delivery challans which lies at page no. 384-394 of the paper book.

10. The assessee has also furnished the detail of transportation by mentioning the name of transporter, bill number, cheque number on the basis of which the fair was paid which lies at page no. 481-483. However, the assessee also furnished the transport bill and vouchers of different dates which lies at page no. 484-544 of the paper book. The assessee made the payment to the said parties through banking channel. The assessee filed the bank statement highlighting the

payment made to the alleged hawala parties which lies at page no. 81-106 of the paper book. The assessee also submitted the tax audit report which lies at page no. 109-121 of the paper book, balance-sheet and profit loss account of A.Y. 2009-10 which lies at page no.122-128 of the paper book. All these documents were furnished by assessee before the AO as well as CIT(A). In this regard the assessee has filed the under taking along with the paper book before us. Anyhow, after receipt of the information from DGIT(Inv.) Mumbai, the Assessing Officer issued the notice u/s 133(6) of the Act to all the parties but the said noticed were not served upon the said parties. The Assessing Officer also deputed the tax inspector to verify the genuineness of the claim and to know about the existence said 20 parties but the 17 parties were not available at the given address. However, notices served upon the Sampart Steel, Revika Trade Impex P. Ltd., Jindal Corporation but these parties nowhere submitted the required information. Sufficient evidence has been submitted by the assessee before the AO. Non service of notice nowhere falsify the claim of the assessee. The assessee has adduced the sufficient evidence in support of the claim against 20 parties. No doubt if the bogus purchase established then in the said circumstances the profit embedded to the bogus purchase is liable to be considered to the income of the assessee in view of the law settled in **Vijay Protein Vs. CIT 58 ITT 458 (Ahd) and CIT Vs. Simit P Sheth 356 ITR 451 (Gujrat High Court)**. In the present case sale has not been disputed and the books

of account have not been rejected In the instant case, when the assessee has adduced the sufficient evidence on record which has been discussed about therefore, in the said circumstances, we are of the view that the no addition is required to be made on account of bogus purchase. Non service of noticed is not a ground to raise the addition of bogus purchase to the income of the assessee in view of the law settled in **CIT Vs. M/s. Nikunj Eximp Enterprises P. Ltd. 2016 taxman.com 171 (Bombay High Court)**. On seeing the above facts and circumstances of the present case and in view of the law settled relied by the Ld. Representative of the assessee we are of the view that the no addition is required to be raised in the instant case. We ordered accordingly, we decide this issue in favour of the assessee against the revenue. Accordingly, the claim of the revenue is hereby ordered to be dismissed.

ISSUE NO.4:-

11. Under this issue the assessee has challenged the disallowance @ 10% of the television expenses, vehicle expenses, conveyance expenses, office & staff welfare expenses and sundry expenses total to the tune of Rs.2,60,347/-. It is incumbent upon the assessee to prove the claim by adducing the sufficient evidence on record. The assessee produced the self made vouchers and also produced the bill and vouchers in support of his claim. The AO restricted the addition to the extent of 10% on the basis of personal element. At the time of the

argument the Ld. Representative of the assessee nowhere produced any other cogent evidence in support of his claim. On account of non producing the sufficient evidence in support of the claim, we are of the view that the CIT(A) has rightly restricted the claim to the extent of 10% of the expenses of Rs.2,60,347/-. Therefore, this issue is being decided in favour of the revenue against the assessee.

In result, appeal of the assessee is hereby partly allowed and the appeal of the revenue is hereby ordered to be dismissed.

ITA NO.797/M/2017 & 531/M/2017:-

12. The assessee as well as revenue have filed the above mentioned appeals against the order dated 03.10.2016 passed by the Commissioner of Income Tax (Appeals)-38, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the assessment year 2010-11.

13. The assessee has raised the following grounds:-

- “1. The order passed by the Ld. CIT(A)-38, Mumbai(hereinafter referred to as the Ld. CIT(A) is bad in law and on facts.*
- 2. Reassessment is bad in law and void ab initio:*
- 2.1 The Ld. CIT(A) erred in upholding the reassessment order passed by the Assessing Officer which is bad in law and void ab initio as it is based on conjectures and surmises without there being concrete reason that the income has escaped the assessment.*
- 2.2. The Ld. CIT(A) failed to consider the plea of the Appellant that the notice for initiating reassessment proceedings was issued by Assessing Officer on 15th February, 2013 where as the AO received information from the CIT-21 regarding*

the alleged purchases vide letter dated 26.02,2013 which goes to show that the AO did not have reasons to believe that income has escaped assessment and initiated proceedings merely on reason to suspect.

- 2.3. *The Ld. CIT(A) erred in upholding the reassessment order without appreciating that the AO had passed a vague order for rejecting the objection raised by the Appellant and the said order was not even a speaking order as per the principles laid down by the Supreme Court in the case of GKN Driveshafts (India) Limited.*
3. *Disallowance of 6[^] amounting to Rs.15,60,270/- in respect of certain purchases alleged to be bogus in nature.*
 - 3.1 *The Ld. CIT(A) grossly erred in making a disallowance of 6[^] in respect of purchases amounting to Rs.15,60,270/- alleged to be bogus in nature based on the information received from the Sales Tax Department, without considering the strong evidence and details submissions given by the appellant.*
 - 3.2 *The Ld. CIT(A) partly upheld the disallowance made by the Assessing Officer without appreciating that the non-payment of VAT by the seller should nor form the basis of disallowance of genuine purchases.*
 - 3.3 *The Ld. CIT(A) grossly erred in disallowing 6[^] of the alleged purchases which is arbitrary and has no basis, even when the evidence s and records submitted by the appellant as well as the corresponding sales to the alleged purchases were not disputed and were duly accepted by both the Assessing Officer and the Ld. CIT(A).*
 - 3.4 *The Ld. CIT(A) grossly erred in upholding part disallowance of the AO without appreciating that the AO did not grant an opportunity to the appellant for cross examining the partly as was requested upon by the appellant at the time of assessment proceedings.*
 - 3.5 *Without prejudice to the above, the amount of disallowance ought to be restricted to 1.645% being the gross profit margin earned by the appellant during the assessment year.*
4. ***Disallowance of 10% amounting to Rs.17,139% in respect of business expenses treating them as personal in nature***
 - 4.1 *The Ld. CIT(A) grossly erred in upholding the disallowance made on estimation basis by the AO in respect of business expenses at 10% of the total*

expenditure amounting to Rs.17,139/-treating to be personal in nature without any specific evidence.

5. *The appellant craves leave to add to alter amend or withdraw all or any of the foregoing grounds of appeal at or before the hearing of this appeal.”*

14. The revenue has raised the following grounds:-

“ 1. *On the facts and circumstances of the case the Ld. CIT(A) erred in deleting the addition of Rs.2,44,44,233- on account of bogus purchases.*

2. *On the facts and circumstances of the case, the Ld. CIT(A) erred in not considering the fact that the assessee was unable to prove the genuineness of the purchases and has failed to produce the hawala parties for examination before the AO despite having been given the opportunity and time to do so.*

3. *On the facts and circumstances of the case, the Ld. CIT(A) failed to appreciate the fact that the details furnished by the assessee are of the nature of secondary evidence and no primary evidence in the form of producing the relevant parties has been filed to prove the genuineness of the purchase.*

4. *The Ld. CIT(A) has failed to appreciate the finding of the Assessing Officer that the purchases have been made out of undisclosed income and the same remained unexplained which required to be added u/s 69C of the I.T. Act.*

5. *On the facts and circumstances of the case, the Ld. CIT(A) erred in sustaining the addition to the extent of Rs.15,60,270/- by taking the GP @ 6% of the bogus purchases of Rs.2,60,04,503/- not considering the facts that the entire purchases are bogus.*

6. *The appellant prays that the order of the CIT(A) on the above grounds be reversed and that of the Assessing Officer be restored.*

7. *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.”*

15. The facts of the present case are the same as mentioned above in the appeal no 277/M/2017, therefore, there is no need to repeat the same. However, the figure is different. In the instant case, the assessee has raised the objection of validity of issuance of notice u/s 148 of the I.T. Act as well as also raised the question of merits.

ISSUE NO.1:-

16. Issue no. 1 is generally in nature which nowhere required any adjudication.

ISSUE NO.2:-

17. Under this issue the assessee has challenged the validity of the notice issued u/s 148 of the I.T. Act. The Ld. Representative of the assessee has argued that the Assessing Officer received the information from Sales Tax Department vide letter dated 26.02.2013 and notice u/s 148 of the Act was issued and served upon the assessee on 15.02.2013 which clearly speaks that there was no reasons at the time of issuance of the notice u/s 148 of the Act to invoke the proceeding, therefore, the condition u/s 148 of the Act was not satisfied, hence, the notice u/s 147/148 of the Act is wrong against law and facts and is liable to be set aside in view of the law settled in **GKN Driveshafts (India) Ltd. Vs. DCIT (2003) 259 ITR 19 (SC), Hemant Traders Vs. ITO (2015) 375 ITR 167 (Bombay) and CIT Vs. Kurban Hussain Ibrahimji Mithiborwala (1971) 82 ITR 821**

(SC). However, on the other hand the Ld. Representative of the Department has refuted the said contentions and argued that the AO was having knowledge earlier before issuance of notice, therefore, the notice u/s 147 of the Act is not bad in law. In view of the argument advanced by the Ld. Representative of the parties and perusing the record, we noticed that the Assessing Officer issued the notice u/s 148 of the Act dated on 15.02.2013 in which the Assessing Officer subscribed the information received the DGIT(Inv.), Mumbai forwarded to the AO vide letter no. CIT-21/H.Qrs/Sales Tax Infor/2012-13 dated 26.02.2013. In view of the said information the case of the assessee was reopened u/s 147 of the Act. The facts have been narrated in the said notice which lies at page no. 1 to 3 of the paper book which speaks about the issuance of notice u/s 148 of the Act on dated 15.02.2013. The Assessing Officer was not having any information at that time because the Assessing Officer received the information from DGIT(Inv.), Mumbai vide letter dated 26.02.2013. When the Assessing Officer was not having any information as on 15.02.2013, therefore, it is strange in which circumstances, the Assessing Officer issued the present notice on the information received through letter dated 26.02.2013 as on date 15.02.2013. The personal knowledge of the Assessing Officer could not be the ground to invoke the proceeding u/s 147/148 of the I.T. Act. Therefore, in the said circumstances the noticed doesn't seem to be legal. It is held by Hon'ble Supreme Court in the case of **CIT Vs. Kurban Hussain**

Ibrahimji Mithiborwala (1971) 82 ITR 821 (SC) that the notice issued for any invalid reason makes the proceeding void and without jurisdiction. We also find support of law in **GKN Driveshafts (India) Ltd. Vs. DCIT (2003) 259 ITR 19 (SC), Hemant Traders Vs. ITO (2015) 375 ITR 167 (Bombay)**. Since the notice is not justifiable and not in accordance with law, therefore, we set aside the notice u/s 147/148 of the Act. Accordingly, this issue is being decided in favour of the assessee against the revenue. Since the legal issue has been decided in favour of the assessee, therefore, adjudication upon the merits in both the appeals would be academic in nature.

18. In the result, the appeal filed by the assessee is hereby allowed and the appeal of the revenue is hereby dismissed.

Order pronounced in the open court on 21.12.2017

Sd/-

(R. C. SHARMA)

लेखासदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 21.12. 2017

vijay

Sd/-

(AMARJIT SINGH)

न्यायिकसदस्य/JUDICIAL MEMBER

आदेशकीप्रतिलिपिअप्रेषित / Copy of the Order forwarded to :

**ITA. Nos. 797 & 277/M17
7574/M/16 & 531/M/17
A.Y. 2009-10 & 2010-11**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त (अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल /Guard file.

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

उप/सहायकपंजीकार (Dy./Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai