**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"I" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member**
**and Shri Saktijit Dey, Judicial Member**

**ITA No. 2601/Mum/2016**
(Assessment Year: 2009-10)

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| Smt. Kiran Navin Doshi<br>D-705, Kalp Nagri<br>B.R. Road, Mulund (W)<br>Mumbai 400080 | Vs. | Income Tax Officer-23(2)(4)<br>C-10, Pratyksha Kar Bhavan<br>BKC, Bandra East<br>Mumbai |

PAN – ABWPD5848A

**Appellant** **Respondent**

Appellant by: None
Respondent by: Shri Milind Rajguru

Date of Hearing: 11.01.2017
Date of Pronouncement: 18.01.2017

**O R D E R**

**Per Jason P. Boaz, A.M.**

This appeal by the assessee is directed against the order of the CIT(A)-40, Mumbai dated 10.02.2016 for A.Y. 2009-10.

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

2.1 The assessee, Proprietor of M/s. Citizen Sales Corporation, engaged in the business as wholesale dealer of iron and steel, filed her return of income for A.Y. 2009-10 on 25.09.2009 declaring total income of ₹1,81,900/-. The return was processed under section 143(1) of the Income Tax Act, 1961 (in short 'the Act'). On the basis of the information received, that the assessee was taking bogus bills from certain parties on payment of commission, the Assessing Officer (AO) initiated proceedings under section 147 of the Act for reopening the assessment for A.Y. 2009-10 and notice under section 148 of the Act dated 12.03.2013 was issued and served o the assessee. The assessment was completed under section 143(3) r.w.s. 147 of the Act vide order dated 18.03.2014, wherein the assessee's income was determined at ₹42,75,360/-, in view of an addition of

₹41,23,015/- under section 69C of the Act as unexplained expenditure on account of bogus purchases for which accommodation/bogus bills were taken by the assessee from nine parties listed in page 2 of the order of assessment.

2.2 Aggrieved by the order of assessment for A.Y. 2009-10 dated 18.03.2016, the assessee preferred an appeal before the CIT(A)-40, Mumbai. The learned CIT(A) disposed off the assessee's appeal by way of the impugned order dated 10.02.2016 allowing the assessee partial relief; whereby only the profit on bogus purchases estimated @12.5% of ₹41,23,015/- i.e. ₹5,15,377/- was held to be taxable in the assessee's hands, as against the entire value of bogus purchases of ₹41,23,015/- brought to tax under section 69C of the Act by the AO.

3. Aggrieved by the order of the CIT(A)-40, Mumbai dated 10.02.2016 for A.Y. 2009-10, the assessee has preferred this appeal, raising the following grounds: -

***"Legal:***

***I. Reopening under section 147 is bad in law***

*i. The Ld. Commissioner of Income Tax (Appeals) - 40, Mumbai [hereinafter referred to as the "Ld. CIT(A"] erred in confirming the action of the Ld. A.O. in reopening the assessment of the Appellant by issuance of the notice dated 12.03.2013 under section 148 of the Act without recording valid and proper reasons to show that any income chargeable to tax has escaped assessment. Hence, the notice dated 12.03.2013 under section 148 and subsequent assessment order passed under section 143 r.w.s 147 is bad in law and the same may be quashed and set aside.*

*ii. The Ld. CIT (A) failed to appreciate that the Appellant was not served with the reasons recoded by the Ld. A.O. for reopening of the assessment. Hence, the notice dated 12.03.2013 under section 148 and subsequent assessment order passed under section 143 r.w.s 147 is bad in law and the same may be quashed and set aside.*

***Merit***

***2. Addition by estimating the profit at the rate of 12.5% on alleged bogus purchases (i.e. 12.5% on Rs.41,23,015/-) - Rs.5,15,377/-***

*iii. The Ld. CIT(A) erred making addition of Rs.* ***5,15,377/-*** *being estimated profit of the Appellant at the rate of 12.5% on alleged*

*bogus purchases of Rs41,23,015/- without appreciating the facts and circumstances of the case. Hence, the estimation of profit amounting to Rs.* ***5,15,377/-*** *on alleged bogus purchases is unjustified and the same may be deleted.*

*iv. The Ld. CIT(A) failed to appreciate that the material purchased during the year are duly accounted in the book of the Appellant and the same are supported by proper documentary evidences. The said material was subsequently sold by the Appellant and the profit earned thereon is offered for tax. Hence, the estimation of profit at the rate 12.05% that is amounting to Rs.* ***5,15,377/-*** *on alleged bogus purchases is unjustified and the same may be deleted.*

*v. The Ld. CIT(A), further, failed to the appreciate that the Ld. A.O. has neither rejected the books of accounts of the Appellant nor pointed any discrepancies in the same. The Ld. A.O. also accepted the sales made during the year. Hence, the estimation of profit in the said circumstances is unjustified and the same may be deleted.*

*vi. Without prejudice to the above the Ld. CIT (A) erred in estimating the profit of Rs.* ***5,15,377/-*** *at the rate 12.5% on alleged bogus purchases on the basis of the certain information received from Sales Tax Department without providing the Appellant an opportunity to cross examine the persons relying on whose statement an adverse inference has been drawn against the Appellant. Hence, the ad-hoc addition of Rs.* ***5,15,377/-*** *is unjustified and the same may be deleted.*

*vii. The Appellant craves leave to add, alter, rescind or amend any of the above grounds of appeal."*

4. Hearing in the case on hand were fixed on a number of occasions and on all these dates, none was present for the assessee and no adjournment of hearing was sought on behalf of the assessee. Even issue of notice by RPAD, which was served on the assessee, did not result in any compliance from the assessee. In these circumstances, we are of the view that the assessee is not interested in pursuing this appeal seriously. On the other hand, the learned D.R. for Revenue was present and ready to argue the case on behalf of Revenue. We, therefore, proceed to dispose off this appeal ex-parte with the assistance of the learned D.R. for Revenue and the material on record.

5. **Ground No. 1 (i) & (ii) – Reopening under section 147 of the Act**

5.1 In this ground (supra), the assessee contends that the learned CIT(A) erred in confirming the action of the AO in reopening the assessment for A.Y. 2009-10 in the case on hand vide notice under section 148 of the Act dated 12.03.2013, without recording valid and proper reasons to show that income chargeable to tax has escaped assessment. It is further contended that the learned CIT(A) failed to appreciate that the assessee was not served with the reasons recorded for reopening the assessment. Therefore, the notice under section 148 of the Act dated 12.03.2013 and subsequent order of assessment passed under section 143(3) r.w.s. 147 of the Act dated 18.03.2014 is bad in law and to be quashed.

5.2.1 We have heard the learned D.R. in the matter and perused and carefully considered the material on record. On a careful perusal of the impugned order of the learned CIT(A), we observe that the grounds raised by the assessee in her appeal as extracted by the learned CIT(A) at para 5 on page 2 thereof are as under: -

**"5.GROUNDS OF APPEAL:**

1. *On the facts and in the circumstances of the case and in law the Ld. AO erred in treating purchases of Rs.*41,23,015/- *as unexplained purchases and added to total income u/s. 69C even after providing the requisite details.*
2. *On the facts and in the circumstances of the case and in law the Ld. AO failed to appreciate the fact that the goods alleged to be purchased from bogus parties were actually sold by the assessee.*
3. *On the facts and in the circumstances of the case and in law the Ld. AO erred in not taking into consideration the material and documentary evidences placed on the records.*
4. *On the facts and in the circumstances of the case and in law the Ld. AO erred in not giving proper opportunity of being heard to your appellant*
5. *On the facts and in the circumstances of the case and in law the Ld. AO violated the principle of natural justice.*
6. *Your appellant requests to allow him to add, to amend, to alter and or to delete any of the grounds mentioned above."*

From the ground raised by the assessee before the learned CIT(A) (supra), it is evidently clear that the issue of validity of reopening of the assessment

for A.Y. 2009-10 was never raised before the learned CIT(A) and therefore he was not called upon to adjudicate on this issue.

5.2.2 We have also perused the order of assessment for A.Y. 2009-10 passed under section 143(3) r.w.s. 147 of the Act vide order dated 18.03.2014. From a perusal thereof it is not evident that the assessee had requested the AO for the reasons recorded for initiation of proceedings under section 147 of the Act for reopening the assessment or that statements of persons whose statements were relied on were sought for cross-examination requested. Further, from the grounds of appeal raised before the learned CIT(A), we find that these issues were not raised before the learned CIT(A) and therefore he was not called upon to consider and adjudicate this issue.

5.2.3 In our view, a perusal of ground No. 1 ((i) & (ii) raised by the assessee before us, were never raised before the learned CIT(A) in appellate proceedings nor is it evident that reasons recorded were sought for form the AO in assessment proceedings or that cross-examination of the parties whose statements were relied upon by the AO was sought by the assessee. These grounds are not maintainable as they are factually erroneous and misleading. We notice that the averments made by the assessee that the learned CIT(A) erred in confirming the action of the AO in reopening the assessment for A.Y. 2009-10 in the case on hand by issuing notice under section 148 of the Act dated 12.03.2013, without recording valid and proper reasons to show that any income chargeable to tax had escaped assessment; is patently and factually false and do not emanate from any finding rendered by the learned CIT(A) in the impugned order. In the factual circumstances of the matter, as discussed above, we dismiss the ground No. 1 (i & ii) raised by the assessee.

6. **Ground No. 2 (iii to vii) – Estimation of Profit of ₹5,15,377/- @ 12.5% on bogus purchases of ₹41,23,015/-**

6.1 In these grounds, the assessee assails the impugned order of the learned CIT(A) in making an addition of ₹5,15,377/- on account of estimated profit @12.5% on bogus purchase of ₹41,23,015/-. It is

contended that the learned CIT(A) failed to appreciate that the material purchased during the year are fully recorded in the assessee's books of account, which were not rejected by the AO and that the same goods were subsequently sold and the profit earned thereon is offered to tax. Without prejudice to the above, the assessee contends that the addition hoc estimation of her profits at ₹5,15,377/- is unjustified and to be deleted since the basis for the said estimation was certain information received from the Sales Tax Department, without providing the assessee opportunity to cross-examine the persons on whose statements an adverse inference was drawn against the assessee.

6.2 The learned D.R. for Revenue placed strong reliance on the decision of the learned CIT(A) in determining the profits from bogus purchases at ₹5,13,777/- @12.5% thereof. It is submitted that the decision of the learned CIT(A) was a detailed and well reasoned decision, rendered after consideration of the facts of the case on hand and the relevant judicial pronouncements in this regard and therefore should be upheld.

6.3.1 We have heard the learned D.R. for Revenue and perused and carefully considered the material on record. We find that the learned CIT(A) has addressed this issue in detail and after considering the submissions of the assessee, the AO's findings and various judicial pronouncements on this issue, has held that since the direct one to one relationships between purchases and sales have not been established, bringing the profit element embedded in the impugned purchase estimated @12.5% thereof, i.e. ₹5,15,377/- to tax in the hands of the assessee would meet the ends of justice. The learned CIT(A) at paras 7 to 7.31 of the impugned order has considered and decided the issue as under: -

> *7. After taking into consideration the AO's findings and the appellant's submissions and order sheet notings, as well as the facts of the case, decision on the ground raised by the appellant, is made here under:-*
>
> *7.1. All the above grounds of appeal are in respect of addition of Rs.41,23,015/- on account of alleged bogus purchases made by the appellant from certain parties. Therefore all the grounds are being taken up together for disposal. Briefly stated, assessee is a proprietor*

*of M/s. Citizen Steel Corporation and engaged in the business as wholesaler dealer in iron and steel. Ld. AO made the addition on the basis of information received from Sales Tax Department, Govt. of Maharashtra regarding parties who are only providing accommodation entries without doing any actual business. Consequent investigation revealed these parties as "hawala operators".*

*7.2 The Ld. AO conducted independent inquiries by issuing notices U/s. 133(6) of the I.T. Act 1961, but the notices were returned unserved as no such firms or parties existed at the given addresses. The appellant was asked to submit the details of purported purchases made from these parties and the assessee was also required to produce the parties concerned for verification. The assessee produced certain evidences, but failed to produce the parties concerned for verification.*

*73. The Ld. AO observed that these hawala operators were providing only accommodation entries and the appellant was also in the list of beneficiaries. The Ld. AO has also held that payment through banking channel does not prove that purchases are genuine, and considering the nature of hawala transactions, production of purchase invoices etc also does not prove that purchases are genuine. The appellant could not even produce details such as transportation of such goods, such as mode of transportation of goods through a particular carrier i.e. truck or tempo, etc, thus it has been held by the Ld. AO that the assessee has failed to furnish any cogent evidence to substantiate the delivery of goods. Moreover the assessee has not produced the parties concerned for verification. Accordingly, the Ld. AO treated the amount of Rs. 41,23,015/- as bogus purchases and added back to the total income of the appellant. Even during appellate stage, no fresh evidences have been submitted.*

*74 The appellant was asked to submit the details of purported purchases made and to show cause why the same should not be disallowed as bogus purchases. The Ld. AO observed that the appellant failed to furnish the supporting documentary evidence to support that the purchases were actually made by them from these parties such as transportation documents, inward register etc. The Investigation Wing of Mumbai had provided a list of hawala bill racketeers who were involved in issuing bills and also the list of beneficiaries. The Sales Tax Department of Mumbai had investigated all these cases thoroughly and prepared a list of such hawala operators and their beneficiaries which have been uploaded in their Website. The Ld. AO observed that these hawala operators were providing only accommodation entries and the appellant was also in the list of beneficiaries. Accordingly, the Ld. AO treated the amount of Rs. 41,23,015/- as bogus purchases and added back to the total income of the appellant.*

*7.5 At assessment stage, opportunity was given to assessee to produce the parties for verification, but the assessee failed to do so.*

*The supplier was in fact the appellant's witness and the Ld. AO was not required to force its attendance. It was for the appellant to produce it as per Civil Procedure Code which applies on all fours to the income-tax proceedings. It is trite that once a transaction is shown to be of the nature of income, the onus shifts to the assessee to show that the same was not taxable. It can thus be safely assumed that the appellant has grossly failed in its duty to mitigate the burden cast upon it in so far as proving the genuineness of the transaction from the said parties is concerned.*

*7.6 In this regard it is also pertinent to mention that while dealing with the concept of burden of proof, onus of proving is always on the person who makes the claim and not on the Revenue. While dealing with the issue of deciding the burden of proof,* ***Hon'ble Supreme Court*** *in the cases of* ***CIT Vs. Durgaprasad More 82 ITR 540 and Sumati Dayal Vs. CIT 214 ITR 801*** *has held that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not real and that Taxing Authorities are entitled to look into surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. The Hon'ble court also held that, it is no doubt, true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden to prove that it is not taxable because it falls within exemption provided by the Act, lies upon the assessee. In the case of* ***Durgaprasad More (Supra),*** *the Hon'ble Court went on to add that a party who relies on a recital in a Deed has to establish the truth of this recital, otherwise it will be very easy to make self serving statements in documents either executed or taken by a party who relied on those recitals. If all that an assessee who wants to evade tax has to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. The Hon'ble Court further held that the Taxing Authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look in to the surrounding circumstances to find out the reality of the recitals made in those documents.*

*7.7. In yet another case of casting of onus viz.* ***Jamnaprasad Kanhaiyalal Vs.CIT 130 ITR 244(SC),*** *Hon'ble Apex Court while considering the scope of immunity u/s. 24 of F.No.(2) Act 1965 held that the immunity provided cannot be invoked in assessment proceedings relevant to any person other than the person making declaration under the Act. In that case, the firm Jamnaprasad Kanhaiyalal had shown cash credits in the names of 5 sons of Kanhaiyalal who had made voluntary disclosure under the Voluntary Disclosure Scheme of 1965 but the Ld. A.O. had not found the explanation satisfactory regarding the credit worthiness of the parties and the same came to be confirmed by the Hon' ble Supreme Court. If against such strict terms of immunity, the Hon'ble Supreme Court*

*could confirm the rejection of explanation of cash credit, in the instant case the appellant has failed to even corroborate the claim before the Ld. A.O.*

*7.8 Reliance is also placed on the judgement of* ***Hon'ble Supreme Court*** *in the* ***case of Sri Meenakshi Mills Ltd 63 1TR 609*** *where it was held that the I.T. Authorities are entitled to pierce the veil of Corporate Entity and to look into reality of transaction. In the case of* ***McDowell & Co. 154 1TR 148(SC)*** *it was stated that implications of tax avoidance are manifold. First, there is substantial loss of much needed public revenue. Next, there is serious disturbance caused to the economy of the country due to piling of mountains of black money, causing inflation. Thus, there is "the large hidden loss" to the community (as pointed out by* ***Master Sheatcroft in 18 Modern Law Review 209)*** *by some of the members in the country being involved in the perpetual war waged between the tax payer and his expert team of advisors, and accountants on the one side and the tax gatherer and his perhaps not so successful advisors on the other side. Hon'ble Court further held that it was for the Court to take stock to determine the nature of new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices would be related to the existing legislation with the aid of emerging techniques of interpretation as was done in Ramsay, Burmah Oil and Dawson to expose the devices for what they really are and to refuse to give judicial benediction.*

*7.9. It is also a settled legal proposition that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. Therefore, onus is always on a person who asserts a proposition or fact, which is not self evident, The onus, as a determining factor of the whole case can only arise if the Tribunal, which is vested with the authority to determine, finally all questions of fact, finds the evidence pro & con, so evenly balanced that it can come to no conclusion, then, the onus will determine the matter. Needless to say that the onus is heavy or light, depending on the facts and circumstances of each case. There cannot be any doubt that onus as a determining factor comes into play where, either there is no evidence on either side, or where it is equally worthless or where it is equally balanced. It is imperative to mention here that where such is not the case and all available evidence is considered, without reference to the onus and without relying on the circumstances that onus lies on a particular party, the issue is determined on facts and the onus cannot be said to have influenced the decisions. However, in the instant case, the appellant has miserably failed to lead evidence and hence, onus is a determining factor.*

*7.10. The Hon'ble Supreme Court, in the case of* ***Chuharmal v. CIT [1988] 172 ITR 250/38 Taxman 190*** *highlighted the fact that the principle of evidence law are not to be ignored by the authorities, but at the same time, human probability has to be the guiding principle, since the AO is not fettered, by technical rules of evidence, as held by*

*the Hon'ble Supreme Court in the case of* ***Dhakeswari Cotton Mills Ltd. v. CIT [1954] 26 ITR 775.*** *The Hon'ble Supreme Court, in the case of Chuharmal (supra) held that what was meant by saying that Evidence Act did not apply to the proceedings under Income-tax Act,1961, was that the rigours of Rules of evidence, contained in the Evidence Act was not applicable; but that did not mean that when the taxing authorities were desirous of invoking the principles of Evidence Act, in proceedings before them, they were prevented from doing so. It was further held by the Hon'ble Apex Court that all that Section 110 of the Evidence Act, 1872 did, was to embody a salutary principle of common law jurisprudence viz, where a person was found in possession of anything, the onus of proving that he was not its owner, was on that person. Thus. this principle could be attracted to a set of circumstances that satisfies its conditions and was applicable to taxing proceedings.*

*7.11 The Ld. AR has relied on a number of decisions where reference has been made to those in the cases of* ***Nikunj Eximp in ITA No. 5604 of 2010 (Bombay High Court);*** *to suggest that no addition could be made on account of disallowance of purchases.*

*7.12. Having gone through the above case law, it is seen that in none of those cases so much of investigation was done including those by another Government authority, viz., Maharashtra Sales Tax authority before whom affidavit was filed stating that only bogus bills were supplied without delivery of goods. If at all the evidences point to the fact that no actual goods were supplied by the parties concerned, therefore, it is certain that no such purchases were actually made from the parties from whom bills were procured and hence, no delivery could have been made by them.*

*7.13. In the case before the Hon'ble Bombay High Court in* ***Nikunj Eximp (supra),*** *the suppliers had not appeared before the Assessing Officer and from the judgment it appears that it was not a case of the suppliers have been found to be non-existent or have denied having made any transaction with the appellant. However, in the present case in appeal, the alleged suppliers have been found to be non-existent. This is not merely a case where the supplier has failed to appear before the Assessing Officer. Hence, the judgment of the Hon'ble Bombay High Court relied upon by the appellant would be of no help to it.*

*7.14. The appellant has also relied on the decision of Hon'ble ITAT Mumbai in the case of* ***Rajeev G. Kalathil in ITA Nos. 6727/Mum/2012*** *and* ***CO No. 06/Mum/2014*** *where vide order dated 20-08-2014, the addition made on account of bogus purchases were deleted. However, I find that the finding of the Hon'ble ITAT is based on the peculiar facts of the case as in that case, goods received by the assessee, from the supplier was admitted to have been transported by the transporter. However, in the present case, no such proof of delivery through a particular lorry number has been provided*

*as far as the appellant's purchase is concerned. Thus, the decision rendered in the case of* ***Rajeev G. Kalathil (supra)*** *cannot be said to be applicable in this case. Similarly, decision of the* ***Hon'ble Bombay High Court*** *in* ***Nikunj Eximp (ITA No. 5604 of 2010)*** *was rendered on the issue whether any substantial question of law was involved in that case. In fact, in a later decision* ***in Nikunj Eximp (2014) 48 Taxmann.com 20 (Bom),*** *Hon'ble Bombay High Court on the very same issue of obtaining bogus bills dismissed the assessee's Writ Petition filed against notice u/s. 148.*

*7.15 Hon'ble Bombay High Court in the case of* ***Killick Nixon Ltd. v. Deputy Commissioner of Income-tax [2012] 20 taxmann.com 703 (Born.)*** *was similarly faced with the question of sham transactions and it inter alia, held as under :*

> *"Section 254 of the Income-tax Act, 1961, read with rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 - Appellate Tribunal - Orders of - Assessment year 2001-02 - Assessee transferred certain land to hank - Assessee claimed to have incurred long-term and short-term capital losses on share trading transactions - Accordingly, it set off said losses against capital gain earned on sale of land - Assessing Officer found that assessee entered into sham and bogus share trading transactions resulting in capital loss with purpose to reduce tax liability arose on capital gain - Assessing Officer, therefore, discarded capital losses - Commissioner (Appeals) confirmed order of Assessing Officer - Tribunal also confirmed order of Assessing Officer, and while doing so, referred to a decision of Supreme Court in case of Sumati Dayal v. CIT [1995] 214 ITR 801 / 80 Taxman 89 to held that* ***evidence produced must be analysed by applying theory of surrounding circumstances and human probabilities*** *- Assessee alleged that without bringing said case to notice of parties, revenue had caused prejudice to its case; all in violation of principles of natural justice and of rule 11 - Whether since decision of Supreme Court in Sumati Dayal case (supra) was cited by Tribunal only for purpose of reiterating well settled and established position of law, it could not be said to have caused prejudice to assessee – Held, yes* ***Whether when a transaction is sham and not genuine as in instant case, then it could not be considered to be a part of tax planning or legitimate avoidance of tax liability - Held, yes*** *- Whether further since issues in instant case were purely questions of facts on which there were concurrent .findings of authorities below, it was to he held that there was no question of law to be considered - Held, yes [In favour of revenue].*
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> *14. So far as the principle laid down in the matter of Omar Salay Mohamed Sait (supra) is concerned there can be no dispute about the proposition laid down therein. However we have not been shown how the Tribunal was in breach of the same. We*

*find that the Tribunal has considered the evidence of purchase and sale of shares to book long term and short term losses and taking all the evidence together including the surrounding circumstances reached a finding that the purchase and sale of shares is not genuine. So far as the decision of the Supreme Court in Vodafone International Holdings B. V.* v. *Union of India [2012] 204 Taxman 408 / 17 taxmann.com 202 is concerned, the Court considered its decisions in the matters of Mc Dowell & Co. Ltd. v. Commercial Tax Officer [1985] 154 ITR 48/22 Taxman 11 (SC), Union of India v. Azadi Bachao Andolan [2004] 10 SCC 1 and the Mathuram Agarwal* v. *State of Madhya Pradesh [1999] 8 SCC 667 and concluded that wl2ere the transaction is not genuine but a colourable device there could be no question of tax planning. The Supreme Court in the aforesaid case after considering the aforesaid two decisions concluded as follows:*

*"The majority judgment in McDowell held that tax planning may be legitimate Provided it is within ilieframeit'ork of law" para-45). In i/u' latter part of para 45, it held that "colourable device cannot he a part of tax planning and it is wrong to encourage the belief that it is honourable to avoid payment of tax by resorting to dubious methods". It is the obligation of every citizen to pay the taxes without resorting to subterfuges". The above observations should be read with para 46 where the majority holds "on this aspect one of us, Chinappa Reddy, J. has proposed a separate opinion with which we agree". The words "this aspect" express the majority's agreement with the judgment of Reddy, J. only in relation to tax evasion through the use of colourable devices and by resorting to dubious methods and subterfuges. Thus, it cannot he said that all lax planning is illegal/illegitimate/impermissible. Morover, Redd'y, J. himself says that he agrees with the majority. In the judgment of Reddy, J. there are repeated references to schemes and devices in contradistinction to "legitimate avoidance of' tax liability (Paras 7-10, 17 and 18,). In our view, although Chinnappa Reddy, J. makes a number of' observations regarding the need to depart from the "Westminster" and tax avoidance- these are clearly only in the context of* ***artificial and colourable devices.*** *Reading McDowell, in the manner indicated hereinabove, in cases of treaty shopping and/or tax avoidance, there is no conflict between McDowell and Azadi Bachao or between McDowell and Mathuram Agarwal".*

*15****. The aforesaid observations of the Supreme Court makes it very clear that a colourable device cannot be a part of tax planning****. Therefore where a transaction is sham and not genuine as in the present case then it cannot he considered to be a part of tax planning or legitimate avoidance of tax liability. The Supreme Court in fact concluded that there is no conflict between its decisions in the matter of McDowell*

*((supra)), Azadi Bachao (supra) and Mathuram Agarwal (supra). In the present case the purchase and sale of shares, so as to take long term and short term capital loss found as a matter of fact by all the three authorities to be a sham. Therefore authorities come to a finding that the same was not genuine. So far as the question Nos. (ii), (iii) (iv) and (v) are concerned, we hold that these are pure questions of facts and as there are concurrent finding of the authorities below, no question of law arises for this court to interfere.*

*7.16. Similarly, in the case of* ***KHANDELWAI, I'RAJ)NG CO. v. ASSISTANT COMMISSIONER OF INCOME-TAX [1996] 55 TTJ 261 (JP.)****, it was observed and held as under:*

*"7. We take up the first contention of Shri Singhvi. It was contended that only gross profit rate should have been applied and the addition should have been to that extent only.*

*8. Let, us assume that the impugned purchases in this case are bogus--what can be the causes and effects? Either corresponding bogus sales have to be accounted for, or, the closing stock to that extent have to be increased. But if either is done, the very purpose of entering 'bogus' purchases is defeated. What can be the purpose to enter a bogus purchase in the books, obviously to show lesser profit than actually earned. This in turn could be to bring the gross profit rate to near about the earlier years' performance in order to avoid a deeper probe by the taxing authorities and/or to avoid paying higher taxes. Thus, when once bogus purchase is entered in the books without a corresponding sales or increase in stocks, the obvious result would be lowering of g.p. rate. If these bogus purchases are removed, the g.p. rate would automatically go up. Under the assumption that the purchases are bogus, one situation visualised is that there are no corresponding sales, then addition at what rate can be more justifiable than by the bogus purchase itself?*

*9. Likewise, there can be another situation also. The purchase may be bogus and correspondingly there may be a bogus sales also, and since both are bogus, the GP rate is obviously manipulated to affect the overall result. Then, accepting Shri Sanghvi's contention would further make the accounts bogus. Similarly, there may be many such situations because, accountancy is essentially an art and not a science.*

*10. The point we are trying to drive home is that when a bogus entry is found in accounts, there cannot be a better solution than to remove that entry. The legitimate way of removing the entry would be, as every student of accountancy would agree, is to do what has been omitted to be done or undo what has been wrongly done.*

*11. Now, so far we were only assuming that the purchases are bogus. Coming to the facts of the case, were the purchases worth Rs. 86,500 really bogus? There is no doubt about it. The investigations got done by the Assessing Officer leave hardly any doubt about it. The failure on the part of the assessee to show cause strengthens the Department's case. This stoic silence of the assessee also blunts the assessee's argument that Shri Hukamchand's statement was recorded at its back. It may have been recorded at its back, but the results thereof were informed to the assessee and that is what the assessee was asked to explain and failed to do so. Thus, now we are not assuming but are concluding that the purchases of Rs. 86,500 were in fact bogus. In case of bogus entries, in our opinion, what could be the best remedy, has been discussed above. The Assessing Officer has simply done that. We are unable to appreciate Shri Singhvi's contention. Had there been suppression of sales, probably, depending on the facts of the case, the addition to the extent of g.p. rate would have been sufficient. But in case of bogus purchases we do not see a better solution than the one adopted by the Assessing Officer.*

*12. But what about the quantitative record which is said to have tallied? In the instant case the assessee has maintained the stock register but the same has been test-checked by the Assessing Officer. There is no specific discussion or finding as regards quantitative tally. However, when in substance the transactions have been proved to be bogus the unverified quantitative tally cannot lead us to conclude otherwise. Under the circumstances of this case, we are not inclined to give much weightage to this contention of the assessee.'*

*7.17. Further, in **Deoria Oxygen Company v. Commissioner of Income-tax** [2007] 160 TAXMAN 427 (ALL.), it was observed and held as under:*

*"40. This leaves us to the question as to whether the Tribunal should have given due regard to the legitimate outgoings in the form of the entire purchases of gas cylinders or not. The principle regarding making of a best judgment assessment has been well settled by the Apex Court in the case of **Dhakeswari Cotton Mills Ltd. v. CIT [1954] 26 1TR 775** wherein the Apex Court has held as follows :—*

*"As regards the second contention, we are in entire agreement with the learned Solicitor-General when he says that the Income-tax Officer is **no/fettered by technical rules of evidence** and pleadings, and that, he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends; because it is equally clear that in making the assessment under sub-section (3) of section 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make*

*an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under section 23(3). The rule of law on this subject has, in our opinion, been fairly and rightly stated by the Lahore High Court in the case of Seth Gurmukh Singh v. CIT [1944] 12 ITR 393 . . . ." (782)*

*41. In the present case we find that the Commissioner of Income-tax (Appeals) as also the Tribunal has recorded a categorical, finding of fact that the applicant did not make purchases to the extent he has shown. The purchases in question have conclusively been provided to be bogus. If the purchases of the gas cylinders have not been made and on the other hand have been found to be bogus by all the authorities including the Tribunal, the question of legitimate outgoings in the form of purchases of the gas cylinders would not arise. Therefore, the Tribunal was justified in not giving benefit of the alleged amount spent towards the purchases of gas cylinders."*

*7.18. In* ***Samurai Software (P.) Ltd. v. Commissioner of Income-tax [2008] 299 1TR 324 (RAJ.),*** *it was held as under:*

*"8. The Tribunal considered the matter in paragraph 6 of its order thus: "6. We have carefully considered the rival submissions of the parties, perused the material available on record and the decision relied upon, by the learned Departmental representative. We find that as a result of search on the assessee-company, the purchases totalling to Rs. 4,37,048 were not fund recorded in the seized books of account of the assessee-company. No surrender was made on behalf of the company by any of the directors of the assessee-company. The surrender was made by Shri Mahesh Toshniwal, one of the directors of the company in his individual capacity and not on behalf of the assessee-company and the same was considered in his personal assessment. Under the law, the company is a separate juridical person. The surrender made by Shri Mahesh Toshniwal, in his individual capacity is not binding on the assessee-company. Shri Mahesh Toshniwal in his personal statements, has nowhere stated that the surrender was made on behalf of the assessee-company. We also find that even in the return filed in response to a notice under section 148, the assessee-company did not include the said amount of bogus purchases. The assessee-company has not placed any material as to show that the said purchases, in fact, belong to Shri Mahesh Toshniwal and not the assessee-company. Under these circumstances, we do not find any merit in the plea of the learned authorised representative that since the said amount of purchases has been added in the hands of Shri Mahesh Toshniwal, no addition can be made in the hands of the assessee-company. It is a settled law that the tax has to be levied on the real person. Under these circumstances and*

*keeping in view the decision of the Hon'ble Delhi High Court as relied on by the learned Departmental representative in the case of* ***CIT v. La Medial [2001] 250 ITR 575, we are of the view that the assessee-company has debited bogus purchases in its books*** *of* ***account*** *which the assessee-company could not substantiate and, accordingly, the Commissioner of Income-tax (Appeals) was not justified in deleting the addition of Rs. 4,37,048, which is directed to be reversed and added in the Income of the assessee-company. Consequently, the addition made by the Assessing Officer amounting to Rs. 4,37,048 is upheld. The ground taken by the Revenue, is therefore, allowed ."*

*9.The Tribunal, thus, by its order dated June 10, 2002, set aside the order of the Commissioner of Income-tax (Appeals) and restored the addition of Rs. 4,37,048 in the hands of the appellant-company as was done by the Assessing Officer.*

*10. In so far as the addition of Rs. 4,37,048 in the hands of the appellant company is concerned, we are satisfied with the reasons given by the Tribunal in paragraph 6 of its order. The addition of the amount of Rs. 4,37,048 in the hands of the appellant-company cannot be said to be unjustified. ".*

*7.19. In the case of* ***Indian Woollen Carpet Factory vs. Income-tax Appellate Tribunal [2002] 125 TAXMAN 763 (RAJ.)*** *it was held as under:*

***"If the transactions were genuine and if the parties had migrated somewhere else, their latest addresses should have been supplied and burden was on the assessee to prove the genuineness of the transactions****, when the assessee claimed that the purchases were genuine. It was true that no loan had been taken from those parties. The case before the Assessing Officer was that the assessee claimed some purchases from some parties, whom he could not produce or those parties were not available when the summon under section 131 was issued. Therefore, the initial dispute was with regard to genuineness of the transaction regarding purchase of wool from the parties,* ***the assessee had failed to discharge the onus to prove the genuineness of the transactions,*** *mere mentioning of Section 68 did not affect the addition made when transactions were found bogus."*

*7.20. In* ***Sanjay Oilcake Industries vs. Commissioner of Income-tax 120091 316 ITR 274 (Guj****), it was held as under:*

*"12. Thus, it is apparent that both CIT(A) and the Tribunal have concurrently accepted the finding of the AO that the apparent sellers who had issued sale bills were not traceable. That goods were received from the parties other than the persons who had issued bills for such goods. Though the purchases are shown to*

*have been made by making payments thereof by account payee cheques, the cheques have been deposited in bank accounts ostensibly in the name of the apparent sellers, thereafter entire amounts have been withdrawn by bearer cheques and there is no trace or identity of the person withdrawing the amount from the bank accounts. In light of the aforesaid nature of evidence it is not possible to record a different conclusion, different from one recorded by CIT(A) and the Tribunal concurrently holding that the apparent sellers were not genuine, or were acting as conduit between the assessee firm and the actual sellers of the raw materials. Both CIT(A) and the Tribunal have therefore come to the conclusion that in such circumstances, the likelihood of purchase price being inflated cannot be ruled out and there is no material to dislodge such finding. The issue is not whether the purchase price reflected in the books of accounts matches the purchase price stated to have been paid to other persons. The issue is whether the purchase price paid by the assessee is reflected as receipts by the recipients. The assessee has, by state of 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 assessee have been actually received by the apparent sellers. Hence, the estimate made by the two appellate authorities does not warrant interference. Even otherwise, whether the estimate should be at a particular sum or at a different sum, can never be an issue of law."*

*7.21 In the case of* ***Assistant Commissioner of Income-tax v Tribhovandas Bhimji Zaveri [2000] 74 ITD 92 (MUM.),*** *Hon'ble Mumbai Bench of ITAT while dealing with the issue of bogus purchases where similar arguments were advanced to buttress the claim of purchase, held as under:*

*"Considering the number of coincidences involved in the scheme, we are of the view that the entire scheme has been planned and coordinated by the assessee-firm. In the case of Homi Jehangir Gheesta vs. CIT (1961) 41 ITR 135 (SC) the apex Court held that while deciding an issue, the Tribunal can consider probabilities properly arising from the facts alleged or proved and by doing so the Tribunal does not indulge in conjectures, surmises or suspicions. The apex Court expressed a similar view in the case of Summati Dayal vs. CIT (1995) 125 CTR (SC) 124 : (1995) 214 ITR 801 (SC) and held that the decision of an adjudicating body based on surrounding circumstances and human probabilities is not bad in law and deserves to be upheld. In the case of McDowell & Co. Ltd. vs. CTO (1985) 47 CTR (SC) 126 : (1985) 154 ITR 148 (SC), the apex Court held that colourable devices are not part of legitimate tax planning. Going by the ratio of these decisions, we are of the view that the assessee-firm cannot be dissociated from the scheme of declaration of gold under the Amnesty Scheme in*

*the names of the family members of the partners of the assessee-firm, as different individuals could not have hit upon the same idea of acquiring gold in the year of account relevant for the asst. yr. 1978-79 and declaring such gold under the Amnesty Scheme and getting the gold valued by the same valuer on the same day and filing their returns under the Amnesty Scheme on the same day, i.e. 30th March, 1987, and subsequently getting the gold converted into ornaments through Karigars on more or less the same day and subsequently selling the ornaments to the assessee-firm in the same year of account without the planning, controlling and coordination of a central agency and that agency in the surrounding circumstances appears to be only the assessee-firm. The apex Court has held in the case of Jamnaprasad Kanhaiyalal (supra) that there is no doubt taxation in taxing the person to whom the income actually belonged with the persons who falsely declared them in their returns filed under the Voluntary Disclosure Scheme. That is a risk which an assessee resorting to unfair tax saving devices has necessarily to run and an assessee who has resorted to such devices has to thank himself for it."*

*7.22. As regards the issue of cross-examination, in T. Devasahaya Nadar v. CIT [1964] 51 ITR 20 (Mad.), it was held:*

***'It cannot be laid down as a general proposition of law that the Income-tax Department cannot rely upon any evidence which has not been subjected to cross-examination.***

*An ITO occupies the position of a quasi-judicial Tribunal and is not bound by the rules of the Evidence Act, but he must act in consonance with natural justice, and or such rule is that he should not use any material against an assessee without giving the assessee an opportunity to meet it. He is not bound to divulge the source of his information.* ***There is no denial of natural justice if the ITO refuses to produce an informant for cross-examination*** *though if a witness is examined in the presence of the assessee, the assessee must he allowed to cross-examine him. The range of natural justice is wide and whether or not there has been violation of natural justice would depend on the facts and circumstances of the case."*

7.23. The Supreme Court had also an occasion to consider *the applicability of the principles of natural justice in* ***R.S. Dass v. Union of India AIR 1967 SC 593****. Referring to the same, the Supreme Court in Chairman, Board of Mining Examination v. Ranijee AIR 1977 SC 965, inter alia, held as follows:*

*Natural justice is no unruly horse, no lurking land mine, nor a judicial cure all.* ***If fairness is shown by the decision maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditional by the facts and circumstances of such***

***situation, no breach of natural justice can he complained of****. Unnatural expansion of natural justice, without reference to the administrative realities and oilier factors of a given case, can he exasperating. We can neither be finicail nor financial but should he flexible yet firm in this jurisdiction....”*

*7.24. In GTC Industries Ltd. v. Assistant Commissioner of Income-tax [1998] 65 ITD 380 (BOM), it was held as under:*

*“105.* ***In our opinion right to cross-examine the witness who made adverse report, is not an invariable attribute of the requirement of the dictum, 'audi alteram partern****'. The principles of natural justice do not require formal cross-examination. Formal cross-examination is a part of procedural justice. It is governed by the rules of evidence and is the creation of Court. It is part of legal and statutory justice and not a part of natural justice, therefore, it cannot be laid down as a general proposition of law that the revenue cannot rely on any evidence which has not been subjected to cross-examination.*

*However, if a witness has given directly incriminating statement and the* ***addition in the assessment is based solely or mainly on the basis of such statement, in that eventuality it is incumbent on the Assessing Officer to allow cross-examination.***

***Adverse evidence and material, relied upon in the order, to reach the finality, should be disclosed to the assessee. But this rule is not applicable where the material or evidence used is of Collateral Nature.”***
*(Emphasis is supplied in all quotations)*

*7.25. To sum up, I would like to quote the landmark case of* ***State Bank of India v. S.K. Sharma AIR 1996 SC 364*** *where the Hon'ble Apex Court observed:*

*"****Justice means justice between the parties. The interest of justice equally demand that the guilty should be punished and that technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the end of justice. They cannot be perverted to achieve from opposite end.****"*

*7.26. In* ***Bholanath Polyfab Pvt. Ltd. 355 ITR 290 (Guj),*** *the facts of the case were that the assessee was engaged in the business of trading in finished fabrics. For the A.Y. 2005-06, the Assessing Officer held that the purchases worth Rs.40,69,546/- were unexplained. He, therefore, disallowed such expenditure claimed by the assessee and computed the total income of Rs.41,10,187/-. The issue was carried in appeal by the assessee before the Ld. CIT(A) who rejected the appeal, upon which the assessee went in further appeal before the Hon'ble Tribunal. The Hon'ble Tribunal substantially allowed the assessee's*

*appeal. In so far as the question of bogus purchase is concerned, the Hon'ble Tribunal concurred with the Revenue's views that such purchases were made from bogus parties. The Tribunal noted that the Assessing Officer had issued notice to all parties from whom such purchases were allegedly made. Such notices were returned unserved by the postal authorities with the remark that the address was incomplete. The Inspector deputed by the Income-tax Department also could not find any of the parties available at the given addresses. The assessee was Liable 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.*

*7.27. Having come to such a conclusion, however, the Tribunal was of the opinion that the purchases may have been made from bogus parties, nevertheless, 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 under consideration were sold by the assessee. The purchases of the entire 1,02,5 14 meters of cloth were sold during the year under consideration. The Hon'ble Tribunal, therefore, accepted the assessee's contention that the finished goods were purchased the assessee, may be not from the parties shown in the accounts, but from other sources. In view of the matter, the Tribunal was of the opinion that not the entire amount, but the profit margin embedded in such amount would be subjected to tax. The Tribunal relied on its earlier decision in the case of* ***Sanket Steel Traders vs. ITO [IT appeal Nos. 2801*** *&* ***2937 (Ahd) of 2008, dated 20-05-2011]*** *and also made reference to the Tribunal's decision in the case of* ***Vijay Proteins Ltd. vs. Asstt.CIT [1996] 58 ITD 428 (Ahd).*** *On appeal by the Department, the Hon'ble Gujarat High Court held as follows :*

> *"We are of the opinion that the Tribunal committed no error. Whether the purchases themselves were bogus or whether the parties from whom such purchases were allegedly made were bogus is essentially a* ***question*** *of fact. The Tribunal having examined the evidence on record came to the conclusion that the assessee did purchase the cloth and sell the finished goods. In that view of the matter, as natural corollary,* ***not the entire amount covered under such purchase, but the profit element embedded therein would be subject to tax.*** *This was the view of this Court in the case of Sanjay Oilcake Industries vs. CIT (2009) 316 ITR 274 (Guj.). Such decision is also followed by this Court in a judgment dated August 16, 2011, in Tax Appeal No. 679 of 2010 in the case of CIT vs. Kishor Amrutlal Patel. In the result, tax appeal is dismissed".*

*7.28 Similarly, in yet another decision of Hon'ble Gujarat High Court in the case of* ***CIT vs. Simit Sheth (2013) 38 Taxmann.com 385 (Guj),*** *Hon'ble Court was seized with a similar issue where the A.O. had found that some of the alleged suppliers of steel to the assessee had not*

*supplied any goods but had only provided sale bills and hence, purchases from the said parties were held to be bogus. The A.O. in that case added the entire amount of purchases to gross profit of the assessee. Ld. CIT(A) having found that the assessee had indeed purchased though not from named parties but other parties from grey market, partially sustained the addition as probable profit of the assessee. The Tribunal however, sustained the addition to the extent of 12.5%. Taking into account the above facts, the Hon'ble Gujarat High Court held that since the purchases were not bogus, but were made from parties other than those mentioned in books of accounts, only the profit element embedded in such purchases could be added to the assessee's income and as such no question of law arose in such estimation. While arriving at the above conclusion, the Hon'ble Court also relied on the decision in the case of* ***Vijay M. Mistry Construction Ltd. 355 ITR 498 (Guj)*** *and further approved the decision of* ***Ahmedabad Bench, ITAT in the case of Vijay Proteins 58 ITD 428.***

*7.29. In the case of* ***Vijay Proteins (supra),*** *the Hon'ble ITAT was seized with a case of bogus suppliers of oil cakes where 33 parties were found to be bogus by the departmental authorities even though payments were made to the said parties by cross cheques and in fact the A.O. in that case had brought adequate material on record to prove that the cross cheques had not been given to parties from whom supplies were allegedly procured but these were encashed from a bank account in the name of another entity, possibly hawala dealer. Subsequently, the money deposited in that account was withdrawn in cash almost on the same day. The Tribunal however, held that if the purchases were made from open market without insisting for genuine bills, the suppliers may be willing to sell the product at a much less rate as compared to a rate which they may charge in which the dealer, has to give genuine sale invoice in respect of that sale. Keeping all such factors in mind, the Tribunal estimated an element of profit percentage of the overall purchase price accounted for in the books of accounts through fictitious invoices.*

*7.30. Further, in the case of* ***M/s. Sanket Steel Traders (ITA No. 2801/Ahd/ 2008 dated*** *20-05-2011 it was, inter-alia, stated as under :*

> *"3. At the time of hearing before us, it is submitted by the Learned Counsel that the addition sustained is excessive. In support of this contention he referred to the decision of the Tribunal in the case of ITO vs. Sun Steel 92 TTI (Ahd) 1126 wherein the Tribunal has sustained the addition of Rs.50,000/- on account of bogus purchases. However, we find that the facts in the above case were different. In the above case, the assessee has shown purchases of Rs.27,39,410/-, sale of Rs. 28,17,207/- and Gross Profit at Rs.94,740/-. The Assessing Officer made the addition of Rs. 27,39,407/- for bogus purchases. If the above sum is added to the Gross Profit, the Gross Profit works out Rs. 2,83,41,247/- which was more than the sale itself The Tribunal held that it is impossible that the Gross Profit is more than the sale itself The Tribunal also*

*found that the assess-ee has maintained the quantitative details in respect of materials purchased and sold. Considering peculiar facts of that case, the Tribunal arrived at the conclusion that it would be fair and reasonable to estimate the addition at Rs.50,000/- as against the addition of Rs.27,39,407/- made by the Assessing Officer. However, the Learned Commissioner of Income-tax (Appeals) considering the facts of the assessee's case, has sustained the addition at 12.5%. While doing so, he has also relied upon the decision of the Tribunal in the case of M/s. Vijay Proteins Ltd. 55 TTI (Ahd) 76. In the case of M/s. Vijay Proteins Ltd. the Tribunal has sustained the addition of 25% of the bogus purchases. However, considering the facts of the assessee's case the C1T(A) restricted the disallowance to 12.5% as against 25% made in the case of M/s. Vijay Proteins Ltd. From these facts it is evident that the CH(A) has sustained the addition at 12.5% of the non-genuine purchases considering the facts of the assessee's case. We, therefore, do not find any justification to interfere with the order of the CIT(A) in this regard. The same is sustained."*

***After considering the facts and the arguments of both the sides, we are of the opinion that it would meet ends of justice, if the disallowance is sustained at 12.5% of the purchase from these two parties.*** *The Assessing Officer is directed to work out the disallowance accordingly"*

*Since the facts of the assessee's case are identical, we respectfully following the above decision of the 1TAT, direct the Assessing Officer to disallow 12.5% of the purchases made during the year under consideration."*

*7.31. As narrated earlier, the Ld. A.O. in this case has held that the parties from whom the purchases were made by the appellant were found to be bogus and that is the reason for which it was not produced during the assessment proceedings. Not having doubted the consumption/sales, the motive behind obtaining bogus bills thus, appears to be inflation of purchase price so as to suppress true profits. As mentioned above, the AO had never disputed or examined the sales. Once sales are accepted, corresponding purchases have to be considered and cannot be disregarded in totality. Looking to the market trend, the appellant may have made purchases from other parties which were not recorded in the books, and took only bills from these parties as accommodation, to explain the purchases. The purchases themselves are not bogus but the purchase parties shown in books are. Therefore, the entire purchase from these parties cannot be added as bogus and what needs to be taxed is the profit element embedded in such transactions. Estimations ranging from 12.5% to 25% have been upheld by the Hon'ble Gujarat High Court, depending upon the nature of the business. As he" n the case of Simit P. Sheth (supra), no uniform yardstick could be applied to estimate the rate of profit and it varies with the nature of business. Taking all facts into consideration as also the findings of the Hon'ble Courts on this issue and the fact that direct*

*one to one relationship between purchases and sales have not been established, I am of the view that estimation of 12.5% as profit embedded in impugned purchases shown from these tainted parties and adding the same to the total income returned, would meet the ends of justice. Therefore, I direct the AO to estimate profit of 12.5% in the alleged bogus purchases, which works out to Rs.5,15,377/- (12.5% of Rs. 41,23,015/-) and restrict the addition to Rs. 5,15,377/-. The appellant get the relief for the balance Rs.36,07,638/-.* ***The Grounds of Appeal, is partly allowed to this extent.****"*

6.3.2 On an appreciation of the facts on record and the findings rendered by the learned CIT(A) in the impugned order (supra), we find that apart from raising these grounds (supra), the assessee has failed to place on record any material evidence to controvert the findings of the learned CIT(A). In this view of the matter, we uphold the order of the learned CIT(A) on this issue of bringing to tax in the assessee's hands the profits embedded in the bogus purchase @ 12% of the purchase cost i.e. ₹5,15,377/-, since the direct one to one relationship/nexus between the said purchases and sales have not been established by the assessee. Consequently ground No. II (iii to vii) is dismissed.

7. In the result, the assessee's appeal for A.Y. 2009-10 is dismissed.

Order pronounced in the open court on 18th January, 2017.

| | |
|---|---|
| Sd/- | Sd/- |
| **(Saktijit Dey)** | **(Jason P. Boaz)** |
| **Judicial Member** | **Accountant Member** |

Mumbai, Dated: 18th January, 2017

*Copy to:*

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -40, Mumbai*
4. *The CIT - 29, Mumbai*
5. *The DR, "I" Bench, ITAT, Mumbai*

*By Order*

//True Copy//

*Assistant Registrar*
*ITAT, Mumbai Benches, Mumbai*

n.p.