आयकर अपीलीय अधिकरण "एच" न्यायपीठ मुंबई में।

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

सर्वश्री राजेन्द्र, लेखा सदस्य एवं संदीप गोसांई ,न्यायिक सदस्य

Before S/Shri Rajendra, A.M. and Sandeep Gosain,J.M.

आयकर अपील सं./ITA No.1596/Mum/2016, **निर्धारण वर्ष /**Assessment Year: 2010-11

आयकर अपील सं./ITA No.1597/Mum/2016, **निर्धारण वर्ष /**Assessment Year: 2011-12

M/s. Fancy Wear 122, Megh Tower, 12th Floor, Gen. A.K. Vaidya Marg, Film City Road Goregaon-E,Mumbai-400 063. **PAN: AACFF 0727 F**	Vs.	Income tax Officer Ward-24(3)(1), Now-31(1)(4) Mumbai.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी / **Respondent**)

Revenue by: Shri M.C. Omi Ningshen-CIT-DR

Assessee by: Shri Sanjay R. Parikh

सुनवाई की तारीख **/ Date of Hearing: 04/08/2017**

घोषणा की तारीख / **Date of Pronouncement: 20.09.2017**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य,राजेन्द्र के अनुसार / Per Rajendra,AM:

Challenging the order dated 21/01/2016 of CIT(A)-42, Mumbai the Assessee is in appeal for the above mentioned two assessment years (AY.s). The assessee is engaged in the business of trading of readymade-garments.As the issues involved in both the years are,so,we are adjudicating both the appeals together.The details of date of filing of return, income declared, assessed income, dates of assessment orders etc. can tabulated as under :-

A.Y.	ROI filed on	Income declared	Assessment dt.	Assessed Income
2010-11	14.10.2011	Rs.2,15,171/-	26/03/2014	Rs.5.51croress
2011-12	29.09.2011	Rs.1,05,187/-	26/03/2014	Rs.4.81 croress

ITA/1596/Mum/2016-AY.2010-11. Brief Facts:

2.Effective ground of appeal is about disallowance 25% of total purchases and making an addition of Rs. 1.37 crores to the total income of the assessee.The return,filed by the assessee, was initially processed u/s.143(1) of the Act. Subsequently,the AO received information from the Sales Tax Department (STD) as well as from DGIT (Inv.), Mumbai that the assessee had received accommodation en tries purchases from suspicious parties.The AO initiated proceed -ings u/s. 147 of the Act,after recording regions thereof. On request of the assessee the AO provided the reasons recorded for issuing the notice u/s. 148.He called for various details during the assessment proceedings. He observed that during the year under consideration the

assessee had debited purchases totalling to Rs. 16.22 crores, that perusal of the details submitted by the assessee about the purchases revealed that it had purchased goods from Shree enterprises(SE) and Shreeji Enterprises (SJE) amounting to Rs. 1.63 crores and Rs. 2.28 crores,that the STD had conducted independent enquiries in each of the hawala parties and conclusively proved that those parties were engaged in the business of providing accommodation entries only, that the STD had provided many documents which related to the above-mentioned parties from whom the assessee had made purchases, that all the documents established beyond doubt that those parties did not supply any goods to the assessee, that the suppliers were issuing bogus bills without delivering any goods or services, that the payments received by those parties were return to the assessee in cash after deducting small commission.

With regard to the notices issued u/s. 133 (6) of the Act, he observed that the postal authorities had written the notices with the mark not known or not claimed,that the assessee was asked to provide the whereabouts of the parties or to produce the parties for verification, that instead of providing a new addresses of the parties the assessee itself submitted the Ledger of the suppliers, that the same could not be relied upon as it had not produced the parties or had provided the new addresses,that it had not purchased goods from above-mentioned parties. Accordingly,the aggregate of the purchases, totalling to Rs. 3.9 crores was treated unexplained expenditure u/s. 69C of the Act and was added to the returned income of the assessee.

He further observed that apart from the above purchases from all parties the assessee had purchased goods from two more entities namely Ridhi Enterprises (RE) and Vardhman Enterprises(VE) of Rs. 1.01 crores and Rs. 55.50 lakhs, that names of both the entities were appearing on the website of the STD in the list of the defaulters. He asked the assessee to explain as to why the purchases from the above-mentioned two parties should not be treated as non-genuine. In its reply,the assessee stated that it had made the payment to RE and VE through banking channels,that the parties appearing in the website of STD per defaulters on account of violation of the provisions of the Act,that they were not hawala operators. However,the AO observed that the assessee had not produced those parties before him though the copy of the Ledger was produced. He held that purchases made, amounting Rs.1.57 crores,from RE in VE, were not genuine. Invoking the provisions of section 69C of the Act,he made a further addition of Rs. 1,57, 31,000/-to the income of the assessee.

3.Aggrieved by the order of the order,the assessee preferred an appeal before the First Appellate Authority (FAA) and made elaborate submissions. He held that assessee was a new assessee and in the year under consideration it had started its business, that it had claimed only 6 major suppliers selling goods worth more than Rs.50,000/- to it, that similarly only 3 major buyers of the assessee had bought goods from it worth more than Rs.1 lakh from it, that the accommodation entry business normally would help buyer to not only get a bill of purchase to inflate its expenses but would also help it to avoid payment of VAT,that the tax evaded would ostensibly pay VAT to the entry providers and would get it back in cash and when the tax evader would collect VAT on its own sale it could claim a set off with the VAT paid on purchases, that in effect of VAT collected would become tax-free receipt in the hands of the assessee, that it had claimed to have purchased goods worth Rs. 10.51 crores,

The assessee had filed certain details to relate its purchases with sales.In that regard the FAA observed that it had not declared any opening stock or closing stock of goods,that it had basically handled the purchases of Clothes Rack Private Ltd.,that the purchase bills had no indication of the size or design or colour of the T-shirts,ladies denim,ladies shirts etc.About the copies of the acknowledgement of the returns of SE and SJE by the STD,he held that it had not filed the evidence of full payment of sales tax payable by the suppliers,that the genuineness of a transaction was always question of fact, that primary onus was on the assessee to prove the purchases made by it, that in the case of suspect hawala dealers it would rely on certain case laws, that a case would be decided as per the facts of its own and the precedent was only what was answered after raising a question of law, that the cases relied upon by the assessee were different as far as facts are concerned. He made a reference to cases of Nikunj Eximp Enterprises Private Limited (372 ITR 619),Simit P Seth(356ITR 451), Bholanath Poly Fab (P.) Ltd.(355 ITR 290),Vijay Proteins Ltd.(58 taxmann.com.44), Sri Ganesh Rice Mills (294 ITR 316), TriStar Jewellery Exports Private Ltd (ITA/8292/Mum/ 2011,dated 31/7/2015). He further analysed the cases decided by the tribunal.

With regard to the claim of the assessee regarding the right to cross-examine the hawala dealers, he held that request was not reasonable,that the assessee had filed its return and claimed the impugned dealers as its suppliers, that the dealers were the witness of the assessee to home the assessee sought to justify its books of accounts,that the AO had merely verified the claim of the assessee and found it to be untrue,that the onus was again on the assessee to substantiate the return of income,that the AO had not rejected the books of accounts of the assessee and had also not be disbelieved the sales, that the purchases were not

proved though the assessee had co-related the purchases and sales,that suppliers were suspect hawala dealers,that the alleged dealers claimed that they had only issued accommodation entries, that the assessee had not provided the new addresses of the suppliers, that the sales of the assessee were verified as same were to existing assessees. Referring to the decisions of the honorable High Courts of Gujarat and Allahabad, he held that an addition of 25% of the purchase price involved was justifiable. In short, he restricted the disallowance to Rs. 1.37 crores and giving a relief of Rs. 4.12 crores to the assessee.

4.Before us,the Authorised Representative (AR) contended that the Department authorities had not doubted the sales made by the assessee, that it had produced all the necessary documents before the AO/FAA, that suppliers had filed their sales tax and income tax returns, that it had filed the confirmation of the suppliers, that the assessee had asked for cross-examination, that the F AA was informed about not providing the chance of cross examination, that there was a clear violation of principles of natural justice, that material received from the STD was never revealed to the assessee in spite of the fact that request was made in that regard, that payments were made through banking channels, that provisions of section 69C were not applicable to the facts of the case, that the source of investment were never in doubt.He relied upon the cases of on Andaman Timber Industries (Civil Appeal No. 42 to 8 of 2006, dated 02/09/2015),Nikunj Eximp Enterprises Private Limited (supra), Parekh Corporation UI Building(32 CCH 129),Glorious Club Pvt.Ltd.(39CCH248), Shri Deepak Popatlal Gala(ITA/5920/Mum/2013 &6203/Mum/2013,dated 27/03/2015). The Departmental Representative (DR)supported the order of FAA and stateddthat profit embedded in the alleged bogus transactions had been rightly upheld by the FAA. On a query by the Bench, about filing of cross appeals by the AO for the above-mentioned assessment years, the DR made enquiries with the AO and informed that no peace were filed by the Department.

5.We have heard the rival submissions and perused the material before us and will like to decide the matter on the basis of the facts of the case under consideration.We are aware that different benches of the Tribunal have dealt the issue of bogus purchases in different manners depending upon certain facts. But,all the matters are fact based and orders are limited to those facts only,as stated by the FAA.In one of the cases,where one of us was party to the addition made by the AO for alleged bogus purchases,it was held that considering the facts of that case the assessee had not proved the genuineness of the transaction and that the order of the FAA was justifiable.But in another case addition made by the AO were deleted depending on

the facts of that matter.In short,no case can be treated as a precedent of binding nature,as far as alleged bogus purchases are concerned.

5.1. We find that in the case under consideration,the AO had issued notice u/s.147 of the Act from the STD and the investigation wing of the department,that the assessee had purchased goods from two of the entities who were considered hawala-dealers by the STD,that the names of two more entities were appearing in the list of the STD under the head defaulters.Considering the above pieces of information,the AO initiated re- assessment proceedings and called for various details about the purchases made by the assessee.In response,the assessee had furnished copies of purchase bills,delivery challans,bank statements showing payments made by the parties,confirmation of ledger accounts of the suppliers,sales tax returns and sales tax challans of the suppliers and their returns of income. The AO had issued notices u/s.133(6)of the Act to the suppliers that were returned by the postal authorities with remark not known or not claimed.The assessee had asked for cross examination of the suppliers vide letter,dated 24/03/2014.The AO did not furnish the copy of the statements of the suppliers to the assessee nor did he allow cross examination of the entities whom he had held hawala-dealers.Finally,he held that the purchases made by the assessee from those parties were not genuine and that entire purchases should be added to the total income of the assessee.In the appellate proceedings, the assessee referred to the copies of the Sales tax returns of the suppliers as well as the copies of their income tax returns.It was emphasised that the sales made by the assessee were accepted by the AO.The FAA was specifically informed about non-furnishing of material for treating the suppliers bogus.He reduced the addition to 25% of the purchases.

5.2. We are of the opinion,that principles of natural justice should always be observed while fastening tax liability upon an assessee.There is no doubt that reopening was based on valid reasons.The AO had necessary prima facie material justifying issue of notice u/.148 of the Act.But,it is also noteworthy that material was available to the AO only and it was never shared with the assessee.When it came to know about the information provided by the STD and returning of notices u/s.133(6),it made a request for cross examining the parties who were treated as hawala-dealers by the STD.The AO was relying upon the inquiries made by the STD about two of the suppliers i.e. SE and SJE.If he was relying upon the statements of those parties,it was his duty to provide the copies of their statements to the assessee and to afford cross examination of the suppliers.The AO had increased the income of the assessee from Rs.2.15 lakhs to Rs.5.51 Croress i.e.roughly 250% on the basis of the inquiries

conducted by a different agency and statements recorded by it.There is no bar on utilising the material gathered by other government agencies and making additions on the basis of such material.But,when the AO was intending to make such a huge addition how could he deprive the assessee to have access to the material that was being used against it.There is no proverbial whisper, about the request made by the assessee for cross examination of the suppliers,in the assessment order.The AO has not uttered a single word about it for the reasons best known to him.The basic principles of natural justice mandate that the assessees should not be given a fair chance to defend itself.e. they should be supplied the material that is proposed to be used against them.Thus,there is a clear cut violation of basics of tax jurisprudence as far as purchases made for SE and SJE is concerned.

5.3. Now,we would like to consider the facts of two other suppliers.As per the AO their names were appearing in the list of defaulters on the website of the STD. He had no other information other than the website.Default of the STD can be on several counts.How does it prove that goods purchased from those two parties were not genuine. A default under the sales tax Act,in itself,cannot be equated with non genuineness of the transaction entered by an entity with other party unless and until some positive corroborative evidence are brought on record.Collecting VAT from the buyer and not depositing it in government treasury at all or not depositing it on due dates,non filing of returns,non payment of taxes or non paying penalty/interest can be some of the defaults. What was the exact nature of default and how it resulted in arriving at the conclusion that the sales made by RE and VE (1.56 croress)to the assessee were non genuine is not known.Even if it is presumed that something serious about the transaction was available on the website,then the fact is not emerging out of the assess - ment order.Secondly if the information was so conclusive,the assessee should have been confronted with it.In short,the addition of crores of rupees was made,without referring to any incriminating and basic material.

5.4. It is a fact that all the payments to the suppliers have been made through banking channels. No evidences has been brought on record proving that the suppliers had withdrawn cash immediately after deposits of cheques of the assessees.Otherwise a probable presump - tion could have been reached that the money trail proved returning of money to the assessee from the suppliers.We are aware that payment by cheques in itself is not conclusive. But,the surrounding circumstances are such that prove that the AO/FAA had made/ upheld the addition not on evidence but on surmises and suspicion.It is said that suspicion of highest degree cannot take place evidence and in the case under consideration the AO/FAA have not

brought sufficient material that could justify huge addition made to the income of the assessee.

5.5. The assessee had specifically,in the written submissions,made before the FAA, had stated that the AO had provided it the material that led to addition,that cross examination was also not allowed.The FAA.s have all the power of the AO.He could have called for a remand report from the AO or could have supplied the assessee the statements of the suppliers,after obtaining the same from the AO,so that the assesse could have known the basis for the abnormal additions.But,he held that the hawala dealers were witness of the assessee and that they had claimed that they had issued only accommodation entries.The AO had reopened the assessment on the basis of the statements of the alleged hawala dealers and the inquiries conducted by the STD.Thus,it was the AO who had taken help of the material received from an outside agency.It is not known as to whether the suppliers had made a general statement or specifically named the assessee to whom they had issued bogus bills.If the AO had clinching evidence in form of the statements of the hawala dealers why a copy of their statement was not given,is not known.The FAA emphasized the fact that the supplier had admitted issuing bogus bills.If it was so,then at least,a chance of cross examining them should have been given to the assessee.The FAA had mentioned that the suppliers had not fully paid the sales tax.It means that they had paid some taxes.If it is so,how they can be labeled as hawala dealers.Even if it is presumed that sales tax paid by them did not relate to the purchases made by the assessee,the said fact should have been brought on record.The FAA or the AO have not made any inquiry about the payment of sales tax vis-a-vis purchases made by the assessee.Providing cross examination is one aspect of the issue,the other aspect is non furnishing of material received from the STD.Once the AO decided to use the material against the assessee, it was his duty to supply the copy of same to the assessee so that it could file explanation.The FAA has not at all dealt with the issue of non supply of statements of the suppliers to the assessee.So,it can be safely said that the assessee had discharged the onus of proving the genuineness of the transactions by producing copies of purchase bills,delivery challans,bank statements showing payments made by the parties,confirmation of ledger accounts of the suppliers,sales tax returns and sales tax challans of the suppliers,income tax returns. After the submissions made by the assessee along with the above documents,the ball was in the court of the AO to discharge his onus-especially when he wanted to invoke the provisions of section 69C of the Act.

5.6. In our opinioin,the information received by the AO was a very good starting point for further investigation.But,he did not taken it to the logical end.It can be said that he left the starting point as and where it was.Without rebutting the evidences produced by the assessee,the AO made the addition and the FAA partly upheld it.The FAA mentioned that copies of sales tax returns and income tax returns of the suppliers were made available to the AO.If the sales tax returns were there then AO/FAA should have made further inquiry to prove that transactions were not genuine.Non-payment of full sales tax by the supplier,as alleged by the FAA,cannot lead the conclusion that the goods purchased by the assessee were not genuine.No inquiry was made with the AO.s of the suppliers though the copies of their returns of income were filed during the assessment proceedings.Whether the AO.s of the suppliers had accepted their returns or had they rejected their books of accounts and held that sales made by them were not genuine,is not known.Thus,the AO and the FAA have not made any further investigation to prove the alleged non genuineness of the transactions.

5.7. It appears that the only thing that has tilted the scale against it is returning back of notices, issued by the AO,u/s.133(6)of the Act.But,this itself is not sufficient to hold that purchases made by it were bogus.In the case of Nikunj Exim Export,the Hon'ble Bombay High Court has held that non service of notice does not conclusively prove the non genuineness of a transacttion.By producing various documents the assessee had proved that balance of convenience was in its favour.The argument of the assessee that the suppliers did not deposit VAT after collecting from it should have been investigated,if the AO wanted to make huge addition.In our opinion,the AO had completed the assessment without marshaling the facts properly and only on the basis of general information provided by the STD.The non filing of appeals against the orders of the FAA , wherein he had deleted 75% of the additions made by the AO,indicate that the department itself was not convinced about the approach adopted by the AO in making additions.Even the order of the FAA is not in accordance with the principles of natural justice,as stated earlier.

5.8. For violation of principles of natural justice alone,the order can be held to be invalid.Here,we would like to rely upon the cases referred to by the AR before us-especially the case of Andaman Timbers(supra) and it reads as under:

> *"…According to us,not allowing the assessee to cross examine the witness by the Adjudicating Authority though the statements of those witnesses were made the basis of impugned order is a serious flaw which makes the order nullity in as much as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the*

statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However no such option was granted and the aforesaid plea is not even dealt by the Adjudicating Authority….."

6.But,we will like to decide the issue on merits also.The AO or the FAA have not rejected the books of accounts of the assessee nor have doubted the purchases made by it.The recognised principles of accountancy and tax jurisprudence hold that no sales can take place without purchases.Thus,the case under appeal is not about non genuineness of purchases itself,but it is about non genuineness of suppliers.Whether provisions of section 69C of the Act can be applied in the matters where all the purchase and sales transactions part of regular books of accounts.Basic precondition for invoking the section 69C is that the expenditure incurred by the assessee should be out of books of accounts. Here,the payments to the suppliers,as stated earlier,have been made by cheques.So,it cannot be held that expenses were incurred by the assessee outside the books of accounts. Section 69C was introduced in to the statute with a specific purpose. A bare reading of the section makes it clear that if the assessee incurred any expenditure, but offered no explanation about the source of such expenditure or part thereof, or the explanation so offered is not satisfactory, such expenditure may be deemed to be the income of the assessee.The assessee has offered satisfactory explanation about the source of the expenditure in the case before us.In the case of Parekh Corporation UI Building(32 CCH 129)the Tribunal has discussed the applicability of provisions of section 69C of the Act and has held as under:

"…. In so far as the application of 69C is concerned, we find that the same cannot be attracted because section 69C applies here in any financial year and assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, of by the assessee is not satisfactory. It is then that the amount covered by such expenditure or part thereof is deemed as income of the assessee for such financial year. The bedrock for making an addition under section 69C is that there must have been some expenditure incurred by the assessee, the source of which is not disclosed. If our such expenditure is recorded in the books of accounts, there cannot be any reason to invoke the provisions of section 69C of the Act. In that view of the matter is it is held that provisions of section 69C were strongly restore by the AO for making this addition."

In light of the above,we find that no addition could have been made u/s.69 C of the Act.

7.Considering the peculiar facts and circumstances of the case under appeal,we hold that the FAA was not justified in confirming the order of the AO partly and retaining the addition to the extent of 25% of the sales.The orders of the AO and FAA are not valid because of violation of principles of natural justice.Besides,the addition made u/s.69C is also not maintainable.So,reversing the order of the FAA,we decide the effective ground of appeal in favour of the assessee.

We would like to emphasise that our order is limited to the facts of the present case and it should not be treated as a precedent.

ITA/1597/Mum/2016-AY.2011-12:

8.Facts and circumstances of the case under consideration are identical to the facts of earlier AY.-except for the amount of addition.During the year,the AO had assessed the income of the assessee at Rs. 4.81 croress,as against the income of Rs.1.05 lakhs returned by it. Following our order for the earlier year,we allow the effective ground of appeal in favour of the assessee.

As a result,appeals filed by the assessee for both the AY.s stand allowed.
फलतःनिर्धारिती द्वारा दाखिल की गईं दोनों नि.व.की अपीलें मंजूर की जाती हैं.

Order pronounced in the open court on 20th September, 2017.
आदेश की घोषणा खुले न्यायालय में दिनांक 20 सितंबर, 2017 को की गई।

Sd/-	**Sd/-**
(संदीप गोसांई **/Sandeep Gosain**)	(राजेन्द्र **/ RAJENDRA**)
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 20.09.2017.
Jv.Sr.PS.
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :
1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR " H " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**,** एच खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार**/ BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai.**