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

Before Shri G Manjunatha (ACCOUNTANT MEMBER)

AND

Shri. Ravish Sood (JUDICIAL MEMBER)

ITA No.3874/Mum/2015 - AY 2007-08
ITA No.3875/Mum/2015 - AY 2008-09
ITA No.3876/Mum/2015 - AY 2009-10
ITA No.7120/Mum/2016 - AY 2011-12

Pratibha Pipes & Structurals Ltd, C/o Jayesh Sanghrajla & Co, Chartered Accountants, Unit No.405, Hind Rajasthan Centre, D.S. Phalke Road, Dadar (E), Mumbai-400 014 PAN : AAACP4898A	vs	DCIT, Cent.Cir. 17 & 28, Mumbai
APPELLANT		**RESPONDEDNT**

C.O. No.100/Mum/2018
(Arising out of ITA No.3874/Mum/2015)
(Assessment Year 2007-08)
C.O. No.101/Mum/2018
(Arising out of ITA No.3875/Mum/2015)
(Assessment Year 2008-09)
C.O. No.102/Mum/2018
(Arising out of ITA No.3876/Mum/2015)
(Assessment Year 2009-10)
C.O. No.254/Mum/2018
(Arising out of ITA No.7120/Mum/2016)
(Assessment Year 2011-12)

DCIT, Cent.Cir. 17 & 28, Mumbai.	vs	Pratibha Pipes & Structurals Ltd, C/o Jayesh Sanghrajla & Co, Chartered Accountants, Unit No.405, Hind

		Rajasthan Centre, D.S. Phalke Road, Dadar (E), Mumbai-400 014
CROSS OBJECTOR		**RESPONDEDNT**

Assessee by	Shri Harshwardhabn Datar / Shri Mangar Shukla
Respondent by	Shri Awungshi Gimson

Date of hearing	28-02-2019
Date of pronouncement	10 -04-2019

O R D E R

Per G Manjunatha, AM:

This bunch of four appeals filed by the assessee and four cross objections filed by the revenue are directed against separate, but identical orders of CIT(A)-51, Mumbai dated 17-03-2016, 18-03-2016 and 12-08-2016 and they pertain to AYs 2007-08, 2008-09, 2009-10 and 2011-12. Since, facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed of by this consolidated order.

2. The assessee has, more or less raised common grounds of appeal in all the appeals. For the sake of brevity, grounds of appeal raised for AY 2007-08 are extracted below:-

> "1. On the given facts, circumstances and judicial pronouncements; Hon. CIT (A) erred in confirming the action of the Ld. Assessing Officer on account of bogus purchases of Rs. 43,14,0767- under the head business income; such addition is bad in law and liable to be deleted.
> 2. Without prejudice to above; on the given facts, circumstances and judicial pronouncements; Hon. CIT(A) erred in confirming the action of the Ld.

Assessing Officer on account of bogus purchases of Rs. 43»14>O76/- under the head business income; such addition is excessive and liable to be reduced.
3. On the given facts, circumstances and legal propositions; Hon. CIT (A) erred in passing the order in absence of reasonable opportunity of making the submissions to the assessee in principles of natural justice and such order is in violation of principles of natural justice and liable to be quashed."

3. The assessee has also filed a petition for admission of additional ground, vide its letter dated 27-03-2017 and taken a legal ground challenging validity of assessment order passed by the AO u/a 143(3) r.w.s. 153A of Income-tax Act, 1961 in absence of proper approval u/s 153D of the Income-tax Act, 1961. The additional ground sought to be raised by the assessee is as under:-

"Sub: Application for admission of additional ground, in case of M/s. Capacite Structures Limited (PAN: AAACP4898A) for A.Y.2007-2008 (ITA No. 3874/MUM/2015) ('C' Bench).
Respected Sir,
1. The application is hereby made requesting for the admission of Additional Ground which is as under:
"1. On the given facts, circumstances and legal pronouncements, Ld. Assessing officer erred in framing the assessment order in the absence of valid approval under the provisions of Section 153D of The Income Tax Act, 1961 and such order passed in the absence of valid approval is bad in law and liable to be annulled."
2. Hon. Bench is hereby requested to admit the additional Ground and kindly adjudicate the same.
3. Reliance in this regard is placed on judgment in case of National Thermal Power Corporation by Hon. Apex Court and Ahmedabad Electricity by the Hon. Jurisdictional Bombay high Court."

4. The Ld.AR for the assessee, at the time of hearing, submitted that additional ground taken by the assessee challenging validity of assessment order passed u/s 143(3) r.w.s. 153A, in absence of valid approval under the provisions of section 153D of the Income-tax ACT, 1961 is a legal issue which questions the jurisdiction of the AO, passing assessment order. Therefore, the

same may be admitted and decided the issue on merit. In this regard, the assessee has relied upon the decision of Hon'ble Supreme Court in the case of National Thermal Power Corporation Ltd vs CIT 229 ITR 383 (SC).

5. On the other hand, the Ld.DR strongly opposed additional ground filed by the assessee and submitted that the assessee failed to make out a case by placing necessary facts before the AO at the time of assessment in connection with the additional ground taken challenging validity of assessment order. Therefore, in absence of any facts as to availability of necessary material before the AO in connection with additional ground, the same may not be admitted at a later stage merely for the reason that it is a legal ground which questions jurisdiction of the AO. In this regard, he relied upon the decision of Hon'ble Bombay High Court in the case of Ultratech Cements Ltd vs CIT Income Tax Appeal No. 1060 of 2014 dated 18-04-2017.

6. We have heard both the parties and perused material available on record. Admittedly, the assessee has taken legal ground challenging validity of assessment order passed by the AO in light of valid approval u/s 153D of the Act, for the first time, before the Tribunal. We find that additional ground taken by the assessee is purely a legal issue which questions the authority of the AO passing assessment order in light of specific provisions provided u/s 153D of the Act. Therefore, we are of the considered view that there is a merit

in additional ground filed by the assessee and hence, the same is admitted for adjudication.

7. The brief facts of the case extracted from ITA No.3874/Mum/2015 for AY 2007-08 are that a search and seizure action u/s 132(1) of the Income-tax Act, 1961 was carried out in the cases of Pratibha Industries group on 10-03-2011 at the office premises as well as residential premises of the directors / partners of the group. Consequent upon the search, notices u/s 153A of the Income-tax Act, 1961 were issued requiring assessee to furnish return of income within 30 days from the date of receipt of the notice. In response to notice, assessee filed return of income on 22-03-2012 declaring total income of Rs.5,42,22,858. Thereafter, the case has been selected for scrutiny and notices u/s 143(2) and 142(1) of the Act along with questionnaire was served on the assessee. In response to notice, the authorised representative of the assessee appeared from time to time and filed various details, as called for. In the meantime, on the basis of information received from sales-tax department, a survey action u/s 133A of the I.T. Act, 1961 was conducted on 15-01-2013 in connection with bogus purchase bills obtained by the assessee from hawala dealers. During the course of survey operation, statement of Shri Ajit B Kulkarni, Managing Director of the company, Shri Ashok Kumar Wadhera, Executive director, Central Purchase department of the company and Shri

Vipul S Shah, Chief Accounts Officer of the company was recorded u/s 131 of the Income-tax Act, 1961. During the course of survey, certain loose papers were found including bills for purchases and other related documents, as per which it was noticed that the assessee had not followed key and important standard operating procedures (SOPs) in respect of certain purchases made from certain parties / suppliers. It was further observed that the assessee had taken accommodation bills / bogus purchases to the extent of Rs.12.86 crores between financial years 2006-07 to 2010-11. In the statement recorded u/s 131, the assessee has admitted failure of following standard operating procedure in respect of purchases, although it has followed SOPs in respect of its purchase department. Further, Shri Ajit B Kulkarni, in his statement recorded during the course of survey also confirmed that there is no proper documentation like delivery challans, transporters slips, weighment slip, stamping at site for receipt of material, truck No. in respect of bills, etc. in respect of 22 vendors appearing in the list suspicious.

8. During the course of assessment proceedings, the AO, in order to verify correctness of purchases claimed to have been made from certain parties, issued a show cause notice and asked the assessee to file complete details including necessary evidences of purchases from certain parties listed in list of hawala dealers prepared by sales-tax department. In response, the assessee,

vide its letter dated 08-03-2013 filed a detailed submission which has been reproduced at para 3 on pages 4 & 5 of AOs order. The main argument of the assessee before the AO was that during the course of survey, no incriminating document was found which suggested inflation of purchases by booking bogus / accommodation bills, therefore, merely on the basis of information received from sales-tax department and also for failure to follow standard operating procedures in respect of certain purchases, no adverse inference could be drawn so as to treat purchases from 22 parties as bogus, when assessee has filed complete details of purchases including purchase bills. Although there is a lapse in SOP followed in respect of certain purchases, which is due to inadvertent mistakes of the persons, who was maintaining records in respect of central purchase department, but otherwise, in respect of all other purchases, no discrepancy was noticed either during survey operations or during assessment proceedings. Therefore, in absence of any finding as to incorrectness in books of account and other details, no adverse inference could be drawn in respect of purchases from above parties.

9. The AO, after considering relevant submissions of the assessee and also taking note of information received from survey operations, held that it was undisputed fact that in respect of certain parties, the assessee has not followed standard operating procedures where as it was found that proper

SOPs were meticulously followed in case of transactions other than bogus bill transactions. The AO further held that it further went on to strengthen the case of the department that where SOPs are violated, the transactions must be bogus. The AO further observed that when the assessee has meticulously followed, SOPs in respect of its central purchase department, if the procedures were bypassed in respect of few purchases, it must give rise to a surmise and suspicion that there is a certain note for scrutiny which is why certain process and certain persons were being bypassed. Therefore, he came to the conclusion that in respect of purchases from 22 parties, certain very important and key documentation which should also be there was found to be absent in case of the transactions where the purchases were involved. Therefore, he was of the opinion that in absence of any proper documentation and also entries in the books of account in respect of purchases from those parties, it is difficult to accept the argument of the assessee that purchases from those parties were genuine in nature. The AO further observed that another very crucial aspect also needed to be considered was that despite giving opportunity to the assessee in this regard, the assessee failed to submit confirmations from those 22 parties, although sufficient time was given. The assessee neither furnished confirmation nor produced the parties. Therefore, without furnishing basic documents required for the purpose of verification of

transactions, asking for a cross examination of the parties is an attempt made to escape on technical grounds without substantiating the purchases from the so-called parties. Accordingly, he made addition towards purchases from those 22 parties u/s 69C of the Income-tax Act, 1961. The relevant observations of the AO are as under:-

> 6.3. It may be pertinent to mention here that it can be seen from the above reply, many issues were taken up by the assessee on merits, which in any ease would certainly be countered. However, it was contended that certified copies of the statements were not handed over by the survey officials to the assessee. In this regardit is pertinent to note that subsequently thereafter as requested by the assessee the copies of the Statements and all jrnpounded material was duly handed over to assessee and so acknowledged by assessee. It was further prayed that assessee should be given time to produce external confirmation of 22 parties regarding which adverse finding were there. With respect, to the same assessee was informed that he was free to submit the said confirmations. Further it was also told to the assessee that it is free to produce these parties before the undersigned in support of its contention. However, at the same time the assessee's request to the undersigned in the reply to issue summons to the 22 parties for cross examination was rejected, after recording a finding that onus is on the assessee to prove the genuineness of these transactions with the said parties.
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> 6.4 On the appointed date assessee has filed another reply which has reiterated majority of the contentions of the earlier reply. The so called external confirmations have neither been submitted before me nor have the parties been produced so as to undergo the **evidentiary process** of **EXAMINATION, CROSS EXAMINATION AND RE-EXAMINATION,** despite opportunity given in this regard. Therefore, it can be clearly said that further opportunities remain to be given now to hear the assessee's version and that the assessee's contention in the earlier reply dated 8.03.2013 in which due opportunity was requested to be given has dulv been acceded to despite which the necessary evidence could not be produced. However, in the replv dated 18.3.2013 and as already referred to above almost entirely the reply was repetitious in nature except to say as under:
>
> "We had requested your honour vide our *earlier* submission dated 8.3.2013 to issue summons to various parries as appearing in survey report so as to enable the assesses for cross examination of the same.
>
> Your honour has shifted the burden on assessee vide order sheet nioting dated 12.3.2013 to prove the genuineness of transactions with *the parties covered under survey operations* to *produce parties before Your* honour *and submit external confirmation on or before 18.3.2013.*
>
> *After verification of the facts, it is submitted that during the relevant year the transactions with the parties as appearing in the show cause notice dt. 8.3.2013 have been capitalized and have not been claimed as deduction from taxable income and hence no addition can be made to returned income.*
> *The rest of the submissions are on the same lines as before."*

10. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has challenged addition made by the AO towards bogus purchases in absence of incriminating material found as a result of search in light of certain judicial precedents including the decision of Hon'ble Bombay High Court in the case of CIT vs Murli Agro Products (2014) 49 taxmann.com 172, in the assessment made u/s 153A. On merits, the assessee has reiterated its submissions made before the AO and argued that purchases from those parties were supported by necessary evidences, therefore, merely for the reason of not following standard operating procedures, no adverse inference could be drawn to make addition u/s 69C of the Act.

11. The Ld.CIT(A), after considering relevant submissions of the assessee and also by following certain judicial precedents, rejected legal ground taken by the assessee challenging addition made towards bogus purchases in absence of incriminating material in the assessments framed u/s 153A by holding that during search and survey, certain incriminating materials were found and seized as per which, the assessee is beneficiary of accommodation / bogus purchase bills issued by hawala dealers and this fact was further supported by the report of sales-tax department where the parties admitted in their statements that they were involved in providing accommodation bills without there being any actual business activity. Insofar as addition made towards

bogus purchases, the Ld. CIT(A) observed that although the AO has brought out various facts in respect of bogus purchases including failure to follow standard operating procedures in respect of alleged bogus purchases, the assessee failed to counter the finding of facts recorded by the AO, except stating that no addition could be made on third party statement, without confronting those statements to the assessee. The Ld.CIT(A) further observed that the question of cross examination and furnishing statement would arise only in case, where the assesseee has filed necessary basic details. Since the assessee has failed to file basic details including confirmation from the party, there is no merit in seeking cross examination of the parties. Therefore, he opined that there is no error in the reasons given by the AO to make addition towards bogus purchases claimed to have made from certain parties mentioned in the list of hawala dealers prepared by sales-tax department. Accordingly, he confirmed addition made by the AO and dismissed appeal filed by the assessee. Aggrieved by the order of CIT(A), assessee is in appeal before us.

12. The first issue that came up for our consideration from assessee additional ground is validity of assessment orders passed by the AO u/s 143(3) r.w.s. 143(3) in absence of valid prior approval of the Addl. CIT(A) u/s 153D of the Income-tax Act, 1961.

13. The Ld.AR for the assessee submitted that the assessment order passed by the AO u/s 143(3) r.w.s. 153A is invalid and void ab initio, because the AO has passed assessment order without obtaining necessary prior approval from the Addl.CIT of concerned range, which is a requirement of the statute, as per the provisions of section 153D of the Act. The Ld.AR further submitted that when there is no prior approval from the authority, who is superior to the AO, who passed assessment order, as per the provisions of section 153D, then the whole proceedings is invalid void ab initio and hence, the AO did not have any jurisdiction to make assessment under the provisions of the Act. The Ld.AR further submitted that although the AO stated to have taken approval from the Addl.CIT, Central Range-4, Mumbai before completion of assessment, but, there was no evidence available in the file for having taken approval u/s 153D of the Act, which is evident from the fact that when the assessee has filed an application under the provisions of RTI Act, 2005, the department has furnished reply and categorically stated that neither the copy of a request letter filed by the AO nor copy of approval granted u/s 153D of the I.T.ACT, 1961 was found in the folder. However, in the 153D approval maintained in the office of Addl CIT, Central Range-4, the approval granted u/s 153D of the Act, in other group caseas of M/s Capacite Structure Ltd (formerly known as Pratibha Pipes & Structurals Ltd) were found, but the approval letter in the

case of M/s Capacite Structure Ltd could not be located. Since, the department itself, has admitted the fact that there was no proof of taking approval u/s 153D, even though the AO has mentioned in his assessment order that prior approval from the competent authority has been taken before passing the assessment order would not validate the assessment order passed by the AO, unless the approval taken u/s 153D was indicated to the assessee. The Ld.AR further submitted that it is an admitted fact that the department has expressed its inability to furnish copy of approval letter issued by the competent authority u/s 153D of the Act. Therefore, even though now they stated that approval u/s 153D has been issued in all group cases cannot cure non availability of approval letter in the case of the assessee. Therefore, in absence of proper approval u/s 153D of the Act, the assessment order passed by the AO u/s 143(3) r.w.s. 153A is void ab initio and liable to be quashed. In this regard, he relied upon certain judicial precedents including the decision of ITAT, Mumbai Bench "H" in the case of Hiklass Moving Picture Ltd vs ACIT in ITA Nos. 936 to 931/Mum/2013 dated 30-09-2016. The assessee also relied upon the decision of ITAT, Pune Bench in the case of Ali Ghulamali Somji vs ITO in ITA No.453/PN/2010 dated 30-03-2012.

14. The Ld.DR, on the other hand, strongly supporting the order of Ld.CIT(A), submitted that there is no merit in the arguments on the legal ground taken by

the assessee challenging validity of assessment order passed u/s 153A r.w.s. 143(3), because the AO has taken necessary approval u/s 153D which is clearly evident from the fact that the AO has categorically recorded facts regarding approval taken u/s 153D on the last page of the assessment order, vide para 7, as per which, the Addl.CIT, Central Range-4 has granted approval u/s 153D vide his letter dated 25-03-2013. The Ld.DR further submitted that there is serious doubt in the intend of the assessee in taking legal ground, for the first time before the Tribunal, that too, after obtaining reply under the RTI Act. The assessee has filed additional ground when the department expressed its inability to furnish copy of approval letter to take advantage of non availability of the letter in the folders. Otherwise, the assessee has not disputed the fact of approval by the AO before passing the assessment order, either by filing necessary petition before the AO or before the first appellate authority by taking a specific ground challenging validity of assessment order. The Ld.DR further submitted that although the Act, mandates obtaining prior approval from the authority under the provisions of section 153D, but, such requirement is only an administrative requirement which has to be complied with by the AO before passing assessment order. In this case, the AO has complied with the requirement of law which is evident from the fact that he had obtained prior approval from the competent authority us 153D of the Act.

15. The Ld.DR referring to affidavit filed by Shri Abhijit Pathankar (DR), ITAT, G-Bench, Mumbai, who was the then Additional CIT, submitted that the officer, who was holding the charge of Range Addl.CIT at the time of passing assessment order, categorically stated in his affidavit that he had issued necessary approval u/s 153D, vide letter No.Addl.CIT/CR-4/Approvl-153D/2012-13 dated 25-03-2013. The Ld.DR further submitted that Shri Milind Rajguru, Joint Commissioner of Income-tax, who was the then AO, who passed the assessment order u/s 143(3) r.w.s. 153A has also filed an affidavit stating that he had passed assessment order after obtaining necessary approval from the Addl.CIT, Cent.Range-4, Mumbai vide letter dated 25-03-2013. If, we go through the affidavits filed by two senior officers, who were part of proceedings in the case of the assessee, have categorically stated that the approval required to be obtained under the Act, has been obtained before passing the assessment order. He, further submitted that mere absence of document from case records cannot undo a statutory action which has been completed after following due procedure of law. He, further stated that as long as both officers, who were in charge of the assessment in assessee case, found that the assessee was always avoiding taking proper statutory remedies. The assessee had enough time to opt for option available to it, but when both officers were not in charge, on account of transfers to other jurisdiction, the

assessee has taken legal ground to derive undue benefit, therefore, the whole issue needs to be appreciated in the perspective of issue before the lower authorities. The Ld.DR further submitted that when the approval required to be taken under the provisions of the Act, has been taken which is supported by the secondary evidence in form of affidavit of concerned officers, there is no reason for the assessee to argue that no approval has been taken. Therefore, he submitted that the additional ground taken by the assessee does not have any merit and needs to be dismissed.

16. We have heard both the parties, perused the materials available on record and gone through the orders of authorities below. There is no doubt with regard to the fact that as per provisions of section 153D, the AO needs to take prior approval from the Addl.Commissioner of the range in charge before passing any assessment order u/s 143(3) r.w.s. 153A of the Income-tax Act, 1961. It is also not in dispute that the AO, in his assessment order at para 7 had categorically stated that the mandatory requirement of approval u/s 153D of the Income-tax Act, 1961 has been taken from the Addl.CIT, Central Range-4, Mumbai vide letter No.Addl.CIT/CR-4/Approvl-153D/2012-13 dated 25-03-2013. It is also not in dispute that the assessee has not raised any objection, whatsoever, with regard to the issue of approval u/s 153D either before the AO or before the first appellate authority. The assessee has taken the legal

ground for the first time before the Tribunal by filing additional ground of appeal. Therefore, the whole issue needs to be apprised in the light of above facts and also the conduct of the assessee. Admittedly, the department, in reply to RTI application clarified that neither copy of approval request letter filed by the AO to the Addl. Commissioner, nor copy of approval granted u/s 153D of the Act, was found in the assessment order folder. However, it was further stated that in the 153D approval folder maintained in the office of Addl.CIT, Range-4, the approval granted in other group cases were traced. The assessee claims that mere mentioning of having been taken approval u/s 153D in the assessment order is not sufficient and what is required to be seen is whether the department is able to provide copy of approval letter granted by the Addl.CIT, or not. Since the department has categorically stated that approval granted u/s 153D of the Act is not available in the assessment folder, obviously, benefit of doubt goes in favour of the assessee that no such approval has been taken by the AO u/s 153D before passing order u/s 143(3) r.w.s. 153A of the I.T. Act, 1961.

17. In the above factual background, if we examine the claim of the assessee by way of additional ground, we find that there is a serious suspicion raises about the conduct of the assessee in taking additional ground challenging the issue of approval u/s 153D of the I.T. Act, 1961, for the first time, before the

Tribunal. The assessee never disputed this issue before the lower authorities. The assessee has taken this issue for the first time before the Tribunal after ascertaining the fact in connection with its RTI application that no such approval was available in the assessment folder. When the assessee has not raised the issue before the CIT(A), then there is a serious doubt arise in the mind about the intend of the assessee to take a legal ground before the Tribunal. In this factual background, if we examine the contents of the approval mentioned by the AO in the assessment order coupled with affidavits filed by two senior most officers, who were in charge of the assessment proceedings, we find that both officers have stated in their affidavits about requirement of law under the provisions of section 153D of the Income-tax Act, 1961. The then AO, Shri Milind Rajguru, Joint Commissioner of Income-tax (Retd) had filed an affidavit and stated that mandatory requirement of approval u/s 153D had been obtained. Further, Shri Abhijit Pathankar, the CIT(DR), has also filed an affidavit and stated that he had granted approval required to be given u/s 153D vide his letter No.Addl.CIT/CR-4/Approvl-153D/2012-13 dated 25-03-2013. Although, affidavit is not primary evidence which cannot be accepted in absence of circumstantial evidences, but in this case, the circumstantial evidence available in the assessment record supports the contents of affidavits filed by both officers. Therefore, the affidavits filed

by the officers cannot be ignored, as not having any evidentiary value. The contents of affidavits filed by the officers coupled with circumstantial evidences available in the assessment folders clearly establish the fact of obtaining necessary approval u/s 153D of the I.T. Act. Though, copy of approval letter is not available in the assessment record, but the contents of approval letter issued by the competent authority has been reproduced in verbatim in the assessment order at para 7. Further, the approval granted in other group cases is very much available in the assessment folder. Therefore, it cannot be said that no approval had been taken. Further, the approval u/s 153D is an administrative procedure which requires to be complied with by the officers, who is discharging the assessment functions. The administration action of the department is not very much relevant for the assessee to justify its case, on merits. Therefore, when assessee goes to question the administrative procedure, rather contending its case on merits, that too, after a lapse of 4 to 5 years, then obviously, a doubt arises about intend of the assessee in taking this ground and such an attempt is derail the issue on merits and to escape on technical ground. Therefore, we are of the considered view that there is no merit in the additional ground taken by the assessee challenging validity of assessment order passed by the AO u/s 143(3) r.w.s. 153A of the Income-tax Act, 1961. Although, the assessee has relied upon

certain judicial precedents, we find that those case laws were rendered under different set of facts, where the assessee had taken the ground challenging validity of the assessment before the CIT(A) and also fact that there was no specific observation in the assessment order for taking approval required to be taken u/s 153D of the Income-tax Act, 1961. In this case, the AO has categorically recorded at para 7 of his assessment order in respect of approval taken u/s 153D and such reference has been further strengthened by the affidavits of two officer, who were part of assessment proceedings. Therefore, the case laws relied upon by the assessee cannot be considered as applicable to the facts of assessee case.

18. In this view of the matter and considering facts and circumstances of the case, we are of the considered view that there is no merit in the additional ground taken by the assessee challenging validity of assessment order passed u/s 143(3) r.w.s. 153A of the I.T. Act, 1961 in light of provisions of section 153D of the I.T.ACT, 1961. Hence, we reject additional ground taken by the assessee.

19. The next issue that came up for our consideration is addition towards bogus purchases from certain parties. The facts borne out from the records are that when the assessment proceedings u/s 143(3) r.w.s. 153A was in progress, there was a survey action u/s 133A of the Income-tax Act, 1961 at

the office premises of the assessee by the DDIT(Inv), Unit I(2), Mumbai. The said survey was conducted on the basis of reports that assessee was taking accommodation entries from hawala dealers and consequently booking bogus purchases to inflate its expenditure and suppress profits. During the course of survey, certain loose papers, bills for purchases and other related documents were found, as per which, it was found that the assessee had not followed key and important standard operating procedures in respect of certain purchases made from certain parties / suppliers. Otherwise, the assessee has followed standard operating procedures, as set out, in respect of all other purchases. When these discrepancies were confronted to Shri Ajit B Kulkarni, Managing Director, Shri Ashok Kumar Wadhera, Executive Director and Shri Vipul S Shah, Chief Accounts Officer, they have admitted in their statements u/s 131 that the company has not followed standard operating procedures in respect of certain purchases from certain parties. During the course of survey, it was further noticed that where the assessee is not following standard operating procedures in respect of purchases from certain parties, the same was matching with the list of suspicious / hawala dealers prepared by the sales-tax department. On the basis of information gathered during the course of survey, coupled with report of sales-tax department, it was noticed that the assessee had taken accommodation bills / bogus purchase to the extent of Rs.13.86

crores in FYs 2006-07 to 2010-11. During the course of assessment proceedings, when the AO called upon the assessee to file complete details of purchases from the so-called hawala dealers, the assessee furnished certain details including purchase bills, but could not file confirmations from the parties. When the AO called upon the assessee to produce the parties in person, the assessee could not do so. Further, on the basis of information filed by the assessee, the AO observed that in respect of purchases from 22 parties, certain very important and key documentation chart, always been there was found to be missing in case of the transactions, where the bogus purchases were involved. Therefore, he came to the conclusion that purchases from 22 parties were bogus in nature and hence, made addition u/s 69C of the Act, towards total purchases from those parties.

20. The Ld.AR for the assessee submitted that the Ld.CIT(A) was erred in confirming addition made by the AO towards bogus purchases without appreciating the fact that mere deficiencies in SOPs followed by the assessee in respect of certain parties, is not a ground to come to the conclusion that purchases from the above parties are bogus, when assessee has furnished details including purchase bills from the parties. The assessee, at the best, could file whatever information available with it. But it could not be expected from the assessee to produce parties in person when the parties were not

immediately available at the time of proceedings. The Ld.AR further submitted that except stating that SOP was not followed in respect of certain purchases, no other adverse comments were made in respect of purchases from above parties. No adverse comments were made in respect of sales declared by the assessee. In absence of any finding as to incorrectness in books of account or sales made outside the books, purchases from certain parties could not be disallowed merely for the reason that the assessee could not file confirmations from those parties. The Ld.AR further submitted that if at all the purchases are considered to be bogus in nature, and then a reasonable percentage of profit may be estimated like other cases, where the Tribunal is consistently estimating profit on alleged bogus purchases.

21. The Ld.DR, on the other hand, strongly supporting the order of the Ld.CIT(A) submitted that the lower authorities have brought out clear facts to the effect that the assessee has failed to file confirmations from the parties and produce the parties in person when the AO has asked the assessee to do so. Further, in respect of evidences filed by the assessee, lot of discrepancies were noticed including lack of identification marks on purchase bills, absence of stamp, absence of proper entries by the store keeper of the goods receipt note, absence of stamp and signature and date of delivery challan as acknowledgement of receipt of material by the store keeper, absence of

transportation receipts, vehicle No., etc. When all these evidences were missing, the AO came to the conclusion that purchases from those parties were bogus which is further supported by investigation carried out during the course of survey, where they have admitted lapse in SOPs followed in respect of certain purchases. Accordingly, there is no error in the findings recorded by the lower authorities while making addition towards bogus purchases and, therefore, their orders should be upheld.

22. We have heard both the parties, perused material available on record and gone through the orders of authorities below. The addition made by the AO is based on report of sales-tax department which is further supported by the survey conducted at the business premises of the assessee, where it was noticed that in respect of purchases from 22 parties, the assessee had not followed SOPs, whereas in respect of general purchases, SOP has been meticulously followed. The AO reached to the conclusion that purchases from 22 parties are bogus in nature when the assessee has failed to file confirmations from those parties and also failed to produce the parties in person, when specifically asked to do so. The AO has brought out number of discrepancies in his assessment order in respect of purchases from the above parties. Although the assessee has filed certain basic evidence including purchase bills from those parties, as per the AO, in respect of purchases from

those parties, there is lack of identification marks on purchase bills, absence of stamp in respect of documents evidencing the receipt of material, absence of proper entries by the store keeper of the goods receipt note in the SAP system and absence of stamp and signature in delivery challan. The AO further brought out more fact to the effect that the assessee is meticulously following standard operating procedure in respect of general purchases except purchase from 22 parties, where these lacunae were noticed. The assessee, except stating that no cross examination was allowed to verify the statement of third parties, but no other evidence has been filed to justify purchases from those parties including confirmation from the parties. Therefore, the AO came to the conclusion that purchases from 22 parties were bogus in nature which is not supported by necessary evidences.

23. It is an admitted fact that during the course of survey u/s 133A, certain loose papers, bills and other relevant documents were found, as per which, the assessee has taken accommodation / bogus purchase bills to the extent of 13.86 crores for FYs 2006-07 to 2010-11. The said quantification has been made on the basis of discrepancies noticed in respect of purchase bills from those parties in comparison to the standard operating procedure followed by the assessee in respect of central purchase department. When these discrepancies were confronted to the managing director of the assessee, Shri

Ajit B Kulkarni, in his statement recorded u/s 131 he had categorically admitted that no standard operating procedure were followed in respect of purchases from 22 parties. This fact has been confirmed by the Executive Director of the company, Shri Ashok Kumar Wadhera and shri Vipin S Shah, Chief Accounts Officer of the company. Further, during the course of assessment proceedings, the AO has carried out enquiries to ascertain correctness of purchases from the above parties in light of facts brought out by the survey party and also in light of report of sales-tax department. Enquiries conducted by the AO prove the fact that purchases from the above parties are bogus which are not supported by necessary evidence. This is because when the AO has called upon the assessee to file confirmation from the parties, the assessee could not file confirmations. The assessee also could not produce the parties in person for verification when the AO has specifically asked the assessee to do so. Therefore, we are of the considered view that the AO has not only made addition on the basis of third party information without confronting those statements to the assessee, but carried out further verification which proved fact that those purchases are bogus in nature. In fact, the facts brought out by the AO during assessment Proceedings clearly establishes the fact of accepting bogus purchase bills from hawala dealers. Accordingly, we reject the

arguments of the assessee that purchases from above parties are genuine, which are supported by necessary evidences.

24. Having said so, let us examine what is the amount of addition needs to be made when the purchases are proved to be bogus which are not supported by necessary evidence. The assessee claims that in case of bogus purchases, only profit element embedded in such purchases needs to be taxed, but not whole bogus purchases, because the AO has not categorically proved the fact that purchases are in fact bogus. The assessee has relied upon various judicial precedents including the decision of ITAT, Mumbai Benches in a number of cases. We find that the ITAT, Mumbai Benches, in a number of cases have taken a consistent view that where purchases are bogus, only profit element embedded in those purchases needs to be taxed, but, not whole purchases from so-called hawala dealers. The Tribunal further considering facts of each case has directed the AO to estimate profit of 10 to 15% depending nature of trade. The Tribunal, while arriving at a conclusion that only profit element in bogus purchases needs to be taxed had recorded categorical finding that the AO has done incomplete enquiries without reaching to a conclusion that purchases from those parties were, in fact, bogus. In many of the cases, the AO has issued notices u/s 133(6), but said notices were returned unanswered by the postal authorities with the remark, 'left' or 'unknown'. When the

notices were returned unanswered, the AO ought to have carried out further enquiries to ascertain the identity of the parties and genuineness of transactions between them, but the AO did not do so. Under these facts, the Tribunal reached to a conclusion that only profit element embedded in those purchases needs to be taxed.

25. In this case, on perusal of facts available on record, we find that the AO has not made addition only on the basis of report of sales-tax department. In fact, the AO has conducted all possible enquiries during the course of assessment proceedings, as per which, he had directed the assessee to file confirmations from the parties and also to produce the parties for examination. But, the assessee could neither file confirmations, nor produce the parties in person. Further, the AO has brought out number of discrepancies in books of account of the assessee including purchases from 22 parties, as per which, the assessee has followed SOPs in respect of all purchases, where each identification has been made including entry of goods, whereas in respect of purchases from 22 parties, no such identification has been made. This fact has been admitted by the assessee and its directors. Therefore, we are of the considered view that under these facts, the ratio laid down by the Hon'ble Supreme Court in the case of NK Proteins Ltd vs DCIT (2017) 292 CTR 354 (SC) is squarely applicable to the facts of assessee case,

where the Hon'ble Supreme Court dismissed appeal filed by the assessee and confirmed the findings of Hon'ble Gujarat High Court in respect of bogus purchases, where the Hon'ble Gujarat High Court, after analysing necessary facts at para 6 of the order, held that once the Tribunal having come to a categorical finding that the purchases from certain parties are bogus, it was not incumbent on it to restrict the disallowance to the extent of 25% of such purchases. The relevant findings of the Court are as under:-

> "6. The Tribunal in the case of *Vijay Proteins Ltd. (supra)* has observed that it would be just and proper to direct the Assessing Officer to restrict the addition in respect of the undisclosed income relating to the purchases to 25% of the total purchases. The said decision was confirmed by this Court as well. On consideration of the matter, we find that the facts of the present case are identical to those of *M/s. Indian Woollen Carpet Factory (supra)* or *Vijay Proteins Ltd. (supra)* In the present case the Tribunal has categorically observed that the assessee had shown bogus purchases amounting to Rs. 2,92,93,2887- and taxing only 25% of these bogus claim goes against the principles of Sections 68 and 69C of the Income Tax Act. The entire purchases shown on the basis of fictitious invoices have been debited in the trading account since the transaction has been found to be bogus. The Tribunal having once come to a categorical finding that the amount of Rs. 2,92,93,2887- represented alleged purchases from bogus suppliers it was not incumbent on it to restrict the disallowance to only Rs. 73,23,3227-.
>
> 6.1 In the case of *NR Paper & Boards Ltd. (supra),* this Court has discussed the issue as to whether after making of block assessment, regular assessment is barred or prohibited by law. This court has held that there would be no overlapping in the nature of assessment made under this Chapter of undisclosed income and the regular assessment made u/s 143(3). However, if the said decision is read in context of questions raised in the present appeal, it cannot be read as having held that even if the material found during the course of search expose the falsity of the entries made in the regular books of accounts, the consequent concealed income cannot be assessed as undisclosed income in the block assessment under Chapter XIV-B. The said decision shall therefore not be applicable on the facts and circumstances of the present case. The Tribunal is justified *in holding the* same against the assessee and in favour of revenue."

26. In this view of the matter and respectfully following the ratio laid down by Hon'ble Supreme Court in the case of N K Proteins Ltd(Supra), we are of the

considered view that the AO was right in making 100% addition towards bogus purchases u/s 69C of the Income-tax Act, 1961. The Ld.CIT(A), after considering relevant facts, has rightly confirmed the findings of Ld.AO. We do not find any error in the order of the Ld.CIT(A) and hence, we are inclined to uphold the order of the Ld.CIT(A) and dismiss the appeal filed by the assessee.

27. The assessee has taken a specific ground challenging the action of the Ld.CIT(A) for not providing reasonable opportunity of hearing to the assessee in violation of principles of natural justice. At the time of hearing, the Ld. AR for the assessee submitted that he did not want to press ground 3 and hence, the same has been dismissed, as not pressed.

28. In the result, appeal filed by the assessee is dismissed.

ITAs No.3875, 3876/Mum/2015 & 7120/Mum/2016

28. The facts and issues involved in these three appeals are identical to the facts and issues which we have already considered in ITA No.3874/Mum/2015. The reasons give by us in preceding paragraphs in ITA No.3874/Mum/2015 shall, mutatis mutandis apply to these appeals also. Therefore, for details reasons given by us in preceding paragraphs, we dismiss these appeals filed by the assessee.

29. In the result, all the appeals filed by the assessee are dismissed.

COs No.100 to 102/Mum/2017 & CO No.254/Mum/2018

30. The revenue has filed these cross objections against additional ground filed by the assessee challenging validity of assessment order passed by the AO u/s 143(3) r.w.s. 153A, in absence of prior approval of competent authority under the provisions of section 153D of the Income-tax Act, 1961. Since, we have already decided additional ground taken by the assessee challenging validity of assessment proceedings in absence of valid approval u/s 153D of the Act, in favour of the revenue and against the assessee, cross objections filed by the revenue become infructuous and not maintainable; hence, cross objections filed by the revenue are dismissed, as infructuous.

31. As a result, all appeals filed by the assessee and cross objections filed by the revenue are dismissed.

Order pronounced in the open court on 10-04-2019.

Sd/-	sd/-
(Ravish Sood)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 10th April, 2019
Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/ By order

Asstt. Registrar, ITAT, Mumbai