आयकर अपीलीय अधिकरण "H" न्यायपीठ मुंबई में।

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

BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 4463/Mum/2016
(**निर्धारण वर्ष /** Assessment Year : 2009-10)

M/s Ratnagiri Stainless Pvt. Ltd., 21/23, Laxmi Niwas, 2nd Parsiwada Lane, Opp V.P. Road Police Station, Mumbai – 400 004.	**बनाम**/ v.	Income Tax Officer 5(3)(1), Mumbai.
स्थायी लेखा सं./PAN : AADCR2993P		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by :	Shri N.M. Porwal
Revenue by :	Ms. Pooja Swaroop,DR

सुनवाई की तारीख /**Date of Hearing : 02-03-2017**
घोषणा की तारीख /**Date of Pronouncement : 04-04-2017**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 4463/Mum/2016, is directed against the appellate order dated 30th March,2016 passed by the learned Commissioner of Income Tax (Appeals)- 10, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2009-10, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 20th January, 2015 passed by learned Assessing Officer (Hereinafter called "the AO") u/s 143(3) r.w.s. 147 of the Income-tax Act,1961 (Hereinafter called "the Act").

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2. The grounds of appeal raised by the assessee in memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

> "1. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeal) erred in confirming addition of Rs. 2997908/- on account of gross profit @ 12.50% on alleged bogus purchases of Rs. 23983261/- to the total income of the Appellant. Provisions of the Act ought to have been properly construed and regard being had to facts of the case no such addition should have been made.
>
> 2. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming conclusion of the Assessing Officer that purchases made by the appellant to the tune of Rs. 23983261/- is bogus and non genuine. Reasons assigned by him are wrong and insufficient to support such conclusion.
>
> 3. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in estimating rate of gross profit of 12.50% on alleged bogus purchases over and above gross profit declared by the appellant on such purchases. Reasons assigned by him are wrong and insufficient to justify such rate of gross profit of 12.50%
>
> 4. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming validity of initiating proceeding under section 147 of the Act by issuing notice under section 148 of the Act. The initiation of proceeding under section 147 of the Act and issuance of notice under section 148 is bad in law and contrary to the provisions of the Act and liable to be cancelled /annulled.
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> 5. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming order made under section 143(3) rws 147 of the Act by the learned Assessing Officer which is illegal, bad-in-law, ultra vires and without allowing reasonable opportunity of the hearing, without appreciating the facts, submission and evidences in their proper perspective, without providing copies of material used against the appellant and therefore same is liable to be annulled.
>
> 6. The learned assessing officer erred in charging interest under section 234A, 234B, 234C and 234D of the Act.

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> 7. The appellant crave leave to add, amend , alter and/or vary any of the grounds of appeal before or at the time of hearing."

3. At the outset learned counsel for the assessee submitted that the assessee did not wish to press ground no. 1,2,5 and 6 raised by the assessee in memo of appeal filed with the tribunal and prayed that the same may be dismissed as not being pressed. The learned counsel for the assessee submitted that he wish to restrict his arguments to ground no. 3 and 4 raised by the assessee in memo of appeal filed with tribunal. The ld DR did not raised any objection to dismissal of ground no.1,2,5 and 6 . We have considered rival contentions and perused the material on record and we hereby order dismissal of ground no. 1,2,5 and 6 raised by the assessee in memo of appeal filed with the tribunal as not being pressed. The ground no. 7 raised by the assessee is also general and does not require separate adjudication by us and is hereby ordered to be dismissed as there are no specific arguments in this context raised by the assessee during course of hearing before us as well in written submissions before us . We order accordingly.

4. Brief facts of the case are that the return of income declaring income of Rs.6,28,330/- was filed by the assessee on 25th September, 2009 which was originally processed by Revenue u/s.143(1) of 1961 Act. The assessment was re-opened by the AO u/s 147 of 1961 Act by the issue of notice u/s. 148 of the Act on 25th March, 2014 which was duly served on the assessee. In response to notice u/s 148 of 1961 Act , the assessee submitted that original return of income filed by the assessee on 25th September, 2009 u/s 139(1) of 1961 Act may be treated as return filed in response to notice u/s. l48 of 1961 Act. Reasons recorded by the AO prior to issue of notice u/s 148 of the Act were also provided by the AO to the assessee. The assessee filed objections for the reopening of the assessment vide letter dated 02.06.2014 which were

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disposed off by the A.O. vide letter dated 06.05.2014. The A.O. while disposing off objections to re-opening observed that as per records of the Sales tax department there were 28 parties from whom the assessee had made hawala transactions who were involved in bogus billing. It was observed by AO that these parties just issue bills for commission without actual supply of goods. In an sworn Affidavit Cum Declaration filed before Sales Tax Investigation Branch, Mumbai and in deposition before the Assistant Commissioner of Sales tax, Investigation Branch, Mumbai ,the directors of the said 28 entities have admitted of issuing only invoices for sake of entry without delivery of goods, were the observation of the AO. The Directors of the said 28 entities stated in their sworn affidavit that they had only supplied bills on receipt of cheques and later on cash was withdrawn from banks and after deduction of agreed commission, balance money was returned in cash to the assessee. The A.O. observed that the statements of the hawala dealers were recorded under oath by the sales tax authority during survey action conducted in their premises and they have confessed to have issued bogus bills in lieu of fixed commission and the assessee company is one of the beneficiaries who has obtained bogus purchase bills amounting to Rs.2,39,83,261/- during the previous year relevant to assessment year 2009-10 from these twenty eight bogus parties as detailed below :-

ASHTAVINAYAK SALES AGENCY	AFWPN2169J	2008-09	21,194
STELCO STEEL INDUSTRIES	AFYPJ0025K	2008-09	371,948
RELIANT METAL CORPORATION	ALAPR6303A	2008-09	468,667
PADMAVATI METAL &ALLOYS	AFSPJ4124P	2008-09	556,674
JINESH METAL CORPORATION	ARDPK1291P	2008-09	48,140
RATNAJYOTI METAL & TUBES PVT. LTD	AADCR3441A	2008-09	135,742
ANIKET STEEL PVT. LTD.	AAGCA0417J	2008-09	779,845

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RELIABLE METAL (INDIA)	AJNPD6596Q	2008-09	957,436
TYSON STEEL AND TUBES PRIVATE LIMITED	AACCT9481B	2008-09	1,131,749
VIGNESHWAR IMPEX	ARDPK1294J	2008-09	1,133,295
RISHAB METAL (INDIA)	AACPJ6417C	2008-09	115,573
RAMANI METAL CORPORATION	AIRPD5688A	2008-09	246,607
POOJA METAL & ALLOYS	ACYPC4975E	2008-09	793,199
MAZDA STEEL TRADE PVT. LTD.	AAECM1196L	2008-09	49,462
ARIHANT TRADE LINK	BDRPS0342C	2008-09	320,881
TAMAS STEEL & ALLOYS PVT. LTD.	AACCT1556F	2008-09	1,122,116
KANAK STEEL (INDIA)	AFYPB6058G	2008-09	1,351,280
WEL STEEL (INDIA)	AHZPD3657L	2008-09	2,651,855
TAKSHIL TRADING PVT. LTD.	AABCT5406H	2008-09	112,829
RAJESHWARI TRADING PVT. LTD	AACCR7829M	2008-09	2,569,340
RANAKPUR SALES CORPORATION	BABPS6817D	2008-09	198,640
ELECON IMPEX PVT LTD	AABCE6233E	2008-09	246,395
NAVRATAN METAL IMPEX	AAIHM5090A	2008-09	256,513
PRIYA STEEL CORPN	AKCPD1838M	2008-09	530,244
VANDNA METAL SYNDICATE	AEWPJ3208B	2008-09	833,173
POOJA STEEL & ALLOYS	ACSPC2231P	2008-09	1,369,290
NAVODAY TRADE IMPEX PVT LTD	AACCN3641F	2008-09	2,024,972
VISHESH STEEL SUPPLIERS	AXVPS3398H	2008-09	3,586,202

The assessee was asked by the AO to furnish details of sale and purchases giving name, address and the amount etc. . The assessee filed the details and from the details , the A.O. observed that the details were exactly matching with the information available with the A.O. Notices u/s.133(6) of the Act

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were issued by the AO to all the above 28 parties. All these notices except one notice were either returned un-served or were not replied to. Only one party namely M/s Ranakpur Sales Corporation, categorically stated that they have not supplied any material to the assessee concern. The assessee was confronted with the same whereby the assessee was asked to produce the parties and also file the documents to substantiate the claim of purchase and stock register, particulars of the transporter, medium of transport, date of transport, transport voucher, octroi post records and payment particulars etc..

The assessee submitted that an affidavit signed before the sales tax authorities cannot be relied upon. It was submitted that the Revenue has treated these parties as hawala operators because these dealers have not paid taxes collected to VAT department. These dealers were raided by VAT authorities and their dealership was cancelled. The assessee asked for cross examination of all these parties. It was submitted that the sales were not disputed by the Revenue and it was submitted that there cannot be sales without purchases. The assessee submitted that it had purchased material from all these parties and these parties are registered VAT certificate holders and registration certificate is issued after thorough verification of all the documents and proper visit by VAT officers. It was submitted that assessee is doing business genuinely and all its purchases were genuine and from the registered TIN holders which is supported with Tax invoice and challans. It was submitted that all the payments were made through cheque and deposited into their bank account. All the sale and purchase transactions were supported with tax invoices, delivery challans, lorry receipts and hence the assessee has discharged its burden. Statement of purchase and sales showing name of the supplier and customers, date of purchase and sales , quantity purchased and sold to show one to one co-relation between purchases and sales were submitted by the assessee before the AO. The

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assessee also submitted VAT audit report. It was submitted that sales are fully vouched and without purchases, there cannot be sales and hence all purchases are genuine. The stock register for full year and ledger copy of the suppliers were also submitted . It was submitted that no addition can be made on the basis of mere affidavit given by suppliers and it was submitted that it will be highly unfair to treat the entire purchases as bogus and add back the same as income u/s 69C of 1961 Act. The assessee relied upon several case laws which are enumerated in page 10 & 11 of the assessment order. The assessee has also sought cross examination of the parties who have given statement against the assessee. The assessee was also issued a fresh show cause letter dated 19.09.2014, whereby the assessee was specifically asked to produce original bills and vouchers, all original documentary evidence of movement of goods for verification, details and documentary evidence of delivery challans, vehicle numbers, weighment slips, details of godowns, details of octroi payment etc. . **However, the assessee did not produce the original documents before the A.O.** . **The assessee also did not file documents for showing movement of goods from supplier to assessee and from assessee to customer as evidence although it stated in its reply that said documents are being filed.** The assessee in nutshell submitted that a mere affidavit filed by a person cannot in itself be an evidence. It was submitted that the assessee was victimized for the fault of the other parties. The sales were not disputed by the Revenue as without a purchase how there can be sales. It was submitted that there was no cash deposit in the bank and the payments have been made by the assessee to selling parties by account payee cheques. It was also submitted that all purchase and sale transactions are supported by tax invoice , delivery challans , lorry receipts etc.. The assessee submitted that notice u/s 133(6) of the Act returned back due to change in the address and also there is a five year gap between the date when transactions took place and the time when notice u/s 133(6) of 1961 Act was issued. The A.O., however, rejected the

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contentions of the assessee and observed that M/s Ranakpur Sales Corporations has categorically stated that they have not supplied any material to the assessee company. **The AO observed that the assessee did not asked for cross examination of Ranakpur Sales Corporation and rather ignored adverse findings given by Ranakpur Sales Corporation. The assessee did not submitted documentary evidence to show that there was movement of goods. The AO observed that the assessee filed delivery challan in one case only and that too there was no mention of transportation details. It was further observed that the notices issued to 28 parties returned un-complied with.** The A.O. observed that the affidavit is a vital piece of evidence and more so a corroborative evidence. The statements recorded before the government authorities form a substantial corroborative evidence. It is a case of default committed through an organized scam to defraud the revenue in a systematic manner. The A.O. observed that the sales were not disputed, however, at the same time it is a fact established that the purchases are not genuine and the purchases have not been made from the parties mentioned in the show cause notice rather the goods were purchased from local grey market where unaccounted goods are sold at much cheaper rate. Payment by account payee cheque in itself does not make any transaction sacrosanct because in the instant case , cash was withdrawn and received back by the assessee after adjusting the commission. The assessee has not furnished any vital documents which can prove movement of goods whereas the assessee was specifically called to produce particular of transporter, medium of transport, date of transport, transport voucher, octroi post records and payment particulars, ware houses etc. to prove movement of goods from supplier to the assessee and from assessee to customer. **The assessee has stated that delivery challans and lorry receipts were submitted but no such documents have been filed by the assessee. It was observed by the AO that out of 28 parties, 27 parties have not responded to notices u/s 133(6) of 1961 Act issued to**

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them. Moreover, the assessee was absolutely silent about M/s Ranakpur Sales Corporations which has completely denied having supplied any goods or materials to the assessee company. The assessee has not furnished the required complete details, documents and evidences. **It was observed that the assessee has not submitted confirmations from these parties nor transportation details of the material purported to be purchased from these suppliers were furnished . The assessee also failed to produce suppliers, transporters or brokers before the AO for verification and enquiry.** The AO held that since the assessee had made sales which were duly quantitatively reconciled by the assessee with purchases , the AO held that purchases were made by the assessee but the same were made at low price from grey market and to cover deficiencies in documents, invoices were obtained from these 28 suppliers who issued bogus bills to the assessee without supplying any material. Thus, the AO held that the assessee failed to prove the onus cast upon it to prove that purchases to the tune of Rs. 2,39,83,261/- made by the assessee were genuine purchases , which were held by the AO to be bogus purchases as no material was supplied to the assessee by these suppliers which material in-fact was purchased from grey market at lower price which led to higher margin of profits which need to be estimated and added to the income of the assessee. The AO relied upon decision of ITAT, Ahmedabad in the case of Vijay Proteins Limited v. ACIT (1996) 58 ITD 428(Ahd.) and other decisions. Thus, the A.O. made gross profit additions @ 12.5% over the total purchases of Rs. 2,39,83,261/- which was held to be non-genuine , which addition came to Rs. 29,97,908/-, vide assessment order dated 20-01-2015 passed by learned AO u/s 143(3) of 1961 Act.

5. Aggrieved by the assessment order dated 20-1-2015 passed by the A.O. u/s 143(3) of 1961 Act , the assessee carried the matter further by filing first appeal before the ld. CIT(A) who upheld the addition made by the A.O. and

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dismissed the appeal of the assessee vide appellate order dated 30-03-2016 passed by learned CIT(A). The learned CIT(A) also upheld the re-opening of the assessment u/s 147 of 1961 Act , vide appellate order dated 30-03-2016 passed by learned CIT(A).

6. Aggrieved by the appellate order dated 30-03-2016 passed by learned CIT(A), the assessee filed second appeal before the Tribunal.

7. The ld. Counsel for the assessee submitted that ground No. 3 is with respect to challenging the additions made by applying gross profit rate of 12.50% to the alleged bogus purchases to the tune of Rs.2,39,83,261/- and ground No. 4 is with respect to challenge to the legality and validity of initiating proceeding u/s 147 of 1961 Act by issuing notice u/s 148 of 1961 Act. The ld. Counsel submitted that based upon the information received from Sales Tax Department the Revenue has reopened the assessment. The ground no . 1,2,5 and 6 were not pressed by the assessee and were already dismissed by us vide our orders in preceding para's of this order. The ground no. 7 being general was also disposed of accordingly as it does not required separate adjudication.

It was submitted that assessee is trader in ferrous and non-ferrous metals. The genesis of re-opening was that the Sales Tax Department conducted raids on the VAT dealers who have allegedly admitted in their statements/affidavits that they were not involved in actual delivery of goods and had given accommodation bills showing that they have sold the goods wherein only paper invoice was issued while no material was delivered . It was submitted that originally no scrutiny assessment was framed u/s 143(3) of the Act while the return of income was only processed u/s 143(1) of the Act. The assessment was re-opened within four years from the end of assessment year by issue of notice u/s 148 of 1961 Act, dated 25-03-2014. It is submitted

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that no independent enquiry has been made by the A.O. and the AO merely relied upon the information received from VAT department. Only at the fag end of the period when the assessment was getting time barred, the assessment was framed. No opportunity was granted to the assessee before framing assessment and no cross examination was allowed, was the contention of the assessee before the tribunal. The A.O. did not doubt the investment made in the purchases by the assessee . Our attention was specifically drawn to page 16 of the assessment order passed by the AO. The issue now is with regard to application of GP ratio as to what is the reasonable rate of GP ratio to be applied which is fair, reasonable, rational and honest so far as assessee is concerned. The A.O. has estimated GP ratio of 12.5% of alleged bogus purchases while no credit is given for declared GP ratio. It is submitted that notice u/s 133(6) of 1961 Act were issued by the AO to all 28 parties but the same were un-served except in one case , wherein the said party deposed against the assessee and admitted that they were engaged in accommodation entries and have only provided accommodation entry to the assessee. The said party namely Ranakpur Sales Corporation , thus, responded to notice u/s 133(6) of the Act whereby they confirmed that they have not supplied material and merely issued invoice without supplying material to the assessee and only provided accommodation entry to the assessee. The ld. Counsel drew our attention to the assessment order para 3.4 and 3.5 and submitted that no cross examination was granted to the assessee. Our attention was also drawn to para 3.10 and 3.11 of the assessment order. The assessee relied upon decision of J H Metal v. ITO reported in (2001) 71 TTJ 0683(Asr.trib.) The ld. Counsel submitted that the assessee has declared following GP ratio for last three years:

Financial Year	% GP
2007-08	4.3%
2008-09	5.45%

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2009-10	4.9%

8. The ld. D.R. submitted that local enquiries were made by the A.O. and notice u/s 133(6) was issued to all the 28 parties and it is wrong to state that no enquiries were made by the A.O. as stated by the ld. Counsel for the assessee. It was submitted that 27 notices returned un-served or were not replied with . Only one party namely Ranakpur Sales Corporation responded and deposed against the assessee. Incriminating information was received from Sales Tax authorities and subsequent to that statement on oath was recorded of these dealers by Sales Tax Authorities in the form of affidavits/statements wherein it was confirmed by these parties that they are indulging in issuing bogus accommodation entries being hawala transactions wherein only invoices were issued while no material was supplied . The detailed movement of transportation of material was not furnished by the assessee. The ld. D.R. relied upon the decision in the case of Vijay Proteins Ltd. v. CIT (2015] 58 taxmann.com 44 (Guj) wherein Hon'ble Gujarat High Court affirmed the additions to the tune of GP rate of 12.5%.

9. The ld. Counsel for the assessee, in the rejoinder, relied upon the decision of the Tribunal in the case of M.M. Ratnam v. ITO in ITA No. 540/Mum/1996 for A.Y. 1989-90 and submitted that the assessment cannot be re-opened. The A.O. has admitted that the investment in purchases were not doubtful and hence there is no question of applying Section 69C of 1961 Act as the source is accepted. The ld. Counsel also submitted that written submissions are placed before the tribunal which should be considered by tribunal. The ld. Counsel for assessee also relied upon the decisions as submitted in case laws /paper book placed in file bur specifically our attention was drawn to following case laws:-

1. Signature Hotels (P) Ltd. v. ITO (2011) 338 ITR 0051 (Delhi HC)

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2. Eveready Industries India Limited v. JCIT (2000) 243 ITR 0540(Gau. HC)
3. Varshaben Sanatbhai Patel v. ITO, Special Civil Application NO. 12873 , 12875 OF 2014, ORDERS DATED 13/10/2015(2015) 282 CTR 00705(GUJ.HC)

10. We have carefully considered the rival submissions and also perused the material available on record. We have also carefully gone through the case laws relied upon by the both parties as well written submissions filed by the assessee.

We have observed that the assessee is engaged in the business as supplier in ferrous and non-ferrous metals.

We find that the assessee filed its return of income with Revenue on 25th September, 2009 which was processed by the Revenue u/s 143(1) of the Act on 24th January, 2011. Thus, no scrutiny assessment u/s 143(3) r.w.s. 143(2) of 1961 Act was framed by Revenue while originally processing return of income which was processed u/s 143(1) of 1961 Act. The case of the assessee was re-opened by the AO u/s 147 of 1961 Act by issue of notice dated 25.03.2014 u/s 148 of 1961 Act, which was re-opened within four years from the end of assessment year. The reasons for re-opening were recorded by the AO prior to the re-opening of the assessment by the Revenue, which were supplied to the assessee and the assessee objected to the reasons so recorded vide letter dated 02-06-2014 , which objections were disposed of by Revenue in June 2014 itself . Thereafter , the assessment was framed by the Revenue u/s 143(3) r.w.s. 147 of 1961 Act vide assessment order dated 20-01-2015. This is the background of the case which is undisputed between the rival parties.

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The genesis of the case is the Information which was received by the A.O. from DGIT (Inv.), Mumbai that there are some parties who were engaged in hawala transactions and are involved in issuing bogus bills for sale of material without delivery of goods, which information was based on information received by Revenue from Maharashtra Sales Tax Authorities that the assessee is beneficiary of hawala/accommodation entries from 28 entry providers to the tune of Rs. 2,39,83,261/- by way of bogus purchases . The accommodation entry providers had deposed and admitted before the Maharashtra Sales Tax Authorities vide statement/affidavits that they were engaged in providing bogus accommodation entries where in bogus sale bills were issued without delivery of goods , in consideration for commission. These accommodation entry providers , on receipt of cheques from the parties against bogus bills for sale of material , later on withdrew cash from their bank accounts which was returned to beneficiaries of bogus bills after deduction of their agreed commission . The assessee was stated to be one of the beneficiaries of these bogus entries of purchase of material from these 28 hawala entry operators in favour of the assessee to the tune of Rs.2,39,83,261/- , wherein the assessee made alleged bogus purchases to the tune of Rs.2,39,83,261/- through these bogus bills issued by hawala entry providers in favour of the assessee. These dealers were surveyed by the Sales Tax Investigation Department whereby the directors of these dealers have admitted in a deposition vide statements/affidavits made before the Sales Tax Department that they were involved in issuing bogus purchase bills without delivery of any material. There is a list of 28 such parties wherein the assessee is stated to be beneficiary of bogus purchase bills to the tune of Rs.2,39,83,261/-. Thus, tangible and material incriminating information was received by the AO which clearly indicted assessee to be beneficiary of bogus purchase entries to the tune of Rs. 2,39,83,261/- from 28 bogus entry providers which formed the reasons to believe by the AO in forming an opinion that income has escaped assessment and the information so received

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by the AO has live link with reasons to believe that income has escaped assessment, wherein the Revenue recorded reasons to believe based on afore-stated incriminating tangible and material information indicting assessee that income of the assessee has escaped assessment and the assessment need to be re-opened u/s 147 of 1961 Act based on such material and tangible incriminating information indicting assessee. At this stage there has to be a prima-facie belief based on some tangible and material information about escapement of income and the same is not required to be proved to the hilt. Thus, at this stage , there has to be prima-facie satisfaction of the AO based on tangible and material incriminating information in his possession leading to reasons to believe that income of the assessee has escaped assessment . That is in a subsequent stage when assessment is being framed u/s 143(3) r.w.s. 147 of 1961 where necessary and detailed opportunities are required to be given to the assessee for rebuttal before fastening tax liability as per scheme and mandate of 1961 Act. It is to be noted also that in the instant case no scrutiny assessment u/s 143(3) r.w.s. 143(2) of 1961 Act was framed originally by the Revenue while processing assessee's return of income filed with Revenue . Return of income of the assessee was originally processed by Revenue u/s 143(1) of the Act only. There was , thus, no formation of opinion as intimation u/s 143(1) of 1961 Act is not an assessment. Thus, there cannot be a change of opinion as no opinion was initially formed by the AO as return was originally processed u/s 143(1) of 1961 Act and no scrutiny assessment was framed by Revenue u/s 143(3) r.w.s. 143(2) of 1961 Act. Thus, it could not be said that no tangible and material incriminating material was received by the A.O. , rather it is only after receipt of tangible and material incriminating material by the AO from DGIT(Inv) incriminating assessee as detailed above , the assessment was reopened u/s 147 of the Act based on such tangible and material incriminating information , and notices u/s 148 was issued by the AO on 25th March, 2014, which is issued within four years from the end of the assessment year. Thus, it cannot be said that

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the Revenue has reopened the assessment based upon suspicion rather genesis of re-opening is incriminating information received from DGIT(Inv), Mumbai based on information received from Maharashtra Sales Tax Department wherein bogus accommodation entry providers have deposed and admitted before Sales Tax Authorities that they are engaged in providing accommodation entries wherein only bogus bills were issued for sale of material in lieu of commission wherein no material is actually supplied by these accommodation entry and the cheque amount was returned back to the beneficiaries in cash after deducting their commissions. The assessee is stated to be beneficiary in the said list of having allegedly received entries from 28 bogus accommodation entry providers to the tune of Rs. 2,39,83,261/-. The original return was processed u/s 143(1) of the Act, and thus no opinion was formed and hence there is no change of opinion. Reliance is placed on the decision of Hon'ble Supreme Court in the case of ACIT v. Rajesh Jhaveri, (2007) 291 ITR 500 (SC), wherein Hon'ble Supreme Court vide orders dated 23-05-2007 has held as under :

> ***"11.*** *It is to be noted that substantial changes have been made to section 143(1) with effect from June 1, 1999. Up to March 31, 1989, after a return of income was filed the Assessing Officer could make an assessment under section 143(1) without requiring the presence of the assessee or the production by him of any evidence in support of the return. Where the assessee objected to such an assessment or where the officer was of the opinion that the assessment was incorrect or incomplete or the officer did not complete the assessment under section 143(1), but wanted to make an inquiry, a notice under section 143(2) was required to be issued to the assessee requiring him to produce evidence in support of his return. After considering the material and evidence produced and after making necessary inquiries, the officer had power to make assessment under section 143(3). With effect from 1-4-1989, the provisions underwent substantial and material changes. A new scheme was introduced and the new substituted section 143(1) prior to the subsequent substitution with effect from 1-6-1999, in clause (a), a provision was made that where a return was filed under section 139 or in response to a notice under section 142(1), and any tax or refund was found due on the basis of such return after adjustment of*

tax deducted at source, any advance tax or any amount paid otherwise by way of tax or interest, an intimation was to be sent without prejudice to the provisions of section 143(2) to the assessee specifying the sum so payable and such intimation was deemed to be a notice of demand issued under section 156. The first proviso to section 143(1)(a) allowed the Department to make certain adjustments in the income or loss declared in the return. They were as follows :

(a) an arithmetical error in the return, accounts and documents accompanying it were to be rectified;

(b) any loss carried forward, deduction, allowance or relief which on the basis of the information available in such return, accounts or documents, was prima facie admissible, but which was not claimed in the return was to be allowed;

(c) any loss carried forward, relief claimed in the return which on the basis of the information as available in such returns accounts or documents were prima facie inadmissible was to be disallowed.

***12.** What were permissible under the first proviso to section 143(1)(a) to be adjusted were, (i) only apparent arithmetical errors in the return, accounts or documents accompanying the return, (ii) loss carried forward, deduction allowance or relief, which was prima facie admissible on the basis of information available in the return but not claimed in the return and similarly (iii) those claims which were on the basis of the information available in the return, prima facie inadmissible, were to be rectified/ allowed/ disallowed. What was permissible was correction of errors apparent on the basis of the documents accompanying the return. The Assessing Officer had no authority to make adjustments or adjudicate upon any debatable issues. In other words, the Assessing Officer had no power to go behind the return, accounts or documents, either in allowing or in disallowing deductions, allowance or relief.*

***13.** One thing further to be noticed is that intimation under section 143(1)(a) is given without prejudice to the provisions of section 143(2). Though technically the intimation issued was deemed to be a demand notice issued under section 156, that did not per se preclude the right of the Assessing Officer to proceed under section 143(2). That right is preserved and is not taken away. Between the period from 1-4-1989 to*

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31-3-1998, the second proviso to section 143(1)(a), required that where adjustments were made under the first proviso to section 143(1)(a), an intimation had to be sent to the assessee notwithstanding that no tax or refund was due from him after making such adjustments. With effect from 1-4-1998, the second proviso to section 143(1)(a) was substituted by the Finance Act, 1997, which was operative till 1-6-1999. The requirement was that an intimation was to be sent to the assessee whether or not any adjustment had been made under the first proviso to section 143(1) and notwithstanding that no tax or interest was found due from the assessee concerned. Between 1-4-1998 and 31-5-1999, sending of an intimation under section 143(1)(a) was mandatory. Thus, the legislative intent is very clear from the use of the word "intimation" as substituted for "assessment" that two different concepts emerged. While making an assessment, the Assessing Officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first proviso to section 143(1)(a), no addition which is impermissible by the information given in the return could be made by the Assessing Officer. The reason is that under section 143(1)(a) no opportunity is granted to the assessee and the Assessing Officer proceeds on his opinion on the basis of the return filed by the assessee. The very fact that no opportunity of being heard is given under section 143(1)(a) indicates that the Assessing Officer has to proceed accepting the return and making the permissible adjustments only. As a result of insertion of the Explanation to section 143 by the Finance (No. 2) Act of 1991 with effect from 1-10-1991, and subsequently with effect from 1-6-1994, by the Finance Act, 1994, and ultimately omitted with effect from 1-6-1999, by the Explanation as introduced by the Finance (No. 2) Act of 1991 an intimation sent to the assessee under section 143(1)(a) was deemed to be an order for the purposes of section 246 between 1-6-1994, to 31-5-1999, and under section 264 between 1-10-1991, and 31-5-1999. It is to be noted that the expressions "intimation" and "assessment order" have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes "the computation of income", sometimes "the determination of the amount of tax payable" and sometimes "the whole procedure laid down in the Act for imposing liability upon the tax payer". ***In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment.*** *The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under section 143(1)(a) as it stood prior to 1-4-1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an*

assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D.K. Jain J) in Apogee International Ltd. v. Union of India [1996] 220 ITR 248 (Delhi). It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from 1-6-1999, except as provided in the provision itself, the acknowledgement of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgement is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any "assessment" is done by them ? The reply is an emphatic "no". The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. ***Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise.***

14. *Additionally, section 148 as presently stands is differently couched in language from what was earlier the position. Prior to the substitution by the Direct Tax Laws (Amendment) Act, 1987, the provision read as follows :*

> *"148. Issue of notice where income has escaped assessment.—(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.*
>
> *(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."*

15. *Section 147 prior to its substitution by the Direct Tax Laws (Amendment) Act, 1987, stood as follows :*

"147. Income escaping assessment.—If—

(a) the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).

Explanation 1.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:—

(a) where income chargeable to tax has been under assessed; or

(b) where such income has been assessed at too low rate; or

(c) where such income has been made the subject of excessive relief under this Act or under the Indian Income-tax Act, 1922 (11 of 1922); or

(d) where excessive loss or depreciation allowance has been computed.

Explanation 2.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not neces-sarily amount to disclosure within the meaning of this section."

16. *Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to*

believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. ***If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion.*** *The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential.* ***At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction*** *ITO v. Selected Dalurband Coal Co. (P.) Ltd. [1996] 217 ITR 597 (SC); Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC).*

17. *The scope and effect of section 147 as substituted with effect from 1-4-1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the*

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Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). ***But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.***

18. *So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued.*

19. *Inevitable conclusion is that High Court has wrongly applied Adani Exports case (supra) which has no application to the case on the facts in view of the conceptual difference between section 143(1) and section 143(3) of the Act.*

20. *Learned counsel for the respondent submitted that other points are available to be raised. Since no other point was urged before the High Court, we find no reason to examine if any other point was available. The appeal is allowed without any orders as to costs."*

Thus, we hold that reopening is valid and legal in the instant case as the ratio of decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited(supra) is directly and squarely applicable to the facts of the instant case, as in the instant case also no assessment was originally framed u/s 143(2) r.ws. 143(3) of 1961 Act while the return of income was originally processed u/s 143(1) of 1961 Act , and hence no opinion was formed by the AO as processing u/s 143(1) of 1961 Act cannot be said to be an assessment and hence there is no question of change of opinion in the

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instant case. The re-opening was also done within four years from the end of assessment year and first proviso to Section 147 of 1961 Act is not applicable. The AO has received an tangible and material incriminating information from DGIT(Inv) , Mumbai which was based on incriminating information received from Sales Tax Department which we have detailed in preceding para's and it was reflected in said incriminating information that the assessee was beneficiary of bogus accommodation entry to the tune of Rs. 2,39,83,261/- from 28 hawala dealers, which information is a tangible and material information sufficient for the purposes of re-opening of the assessment in the instant case as the said re-opening is done by the AO within four years from the end of the assessment year and no scrutiny assessment u/s 143(3) r.w.s. 143(2) of 1961 Act was framed originally by Revenue, thus, consequently first proviso to Section 147 of 1961 Act was not applicable in the instant case under appeal before the tribunal. The incriminating tangible and material information so received by the AO is with regard to the facts previously disclosed which has comes into possession of the AO which tends to expose the untruthfulness of those facts as were disclosed in the return of income by the assessee, which return of income was incidentally also not scrutinized by the Revenue. The incriminating information so received by the AO in the instant case which became foundation for re-opening of the assessment was sufficient to form reasons to believe by the AO that income has escaped assessment, as the assessee was specifically incriminated in the said information having received bogus accommodation entries for purchases to the tune of Rs. 2,39,83,261/- from 28 bogus entry providers being hawala traders providing accommodation purchase bills without actual delivery of material . In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information exposing un-truthfulness of information furnished in return of income filed with Revenue. We are of the considered view that on the basis of information received and if the assessing officer is

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satisfied that reasonable ground exists to believe, then in that case the power of the assessing authority extends to re-opening of assessment, which in the instant case the conditions are duly met for re-opening based on factual matrix of the case. The tangible and material incriminating information so received by the AO from DGIT(Inv.), Mumbai which in turn was based on information received from Maharashtra Sales Tax Authorities incriminating assessee to be beneficiary of Hawala transactions being recipient of bogus accommodation entries from 28 entry operators to the tune of Rs.2,39,83,261/- which is based on deposition and admission of these entry providers before other Government authority being Maharashtra VAT authorities is so obvious that to say that the AO has not applied his mind to reach satisfaction in forming reasons to believe that income of assessee has escaped assessment to initiate re-opening u/s 147 of 1961 , is too far-fetched and such contention of the assessee is out-rightly rejected. There is live link between material and tangible incriminating information received by the assessee and formation of reasons to believe that income of the assesse has escaped assessment in the instant case under appeal before us. The decision of Hon'ble Gujarat High Court in the case of Varshaben Sanatbhai Patel v. ITO (supra) relied upon by the assessee is distinguishable wherein the AO recorded reasons that reopening was done based on the verification of details available on records while in-fact information was received from DGIT(Inv), Mumbai about bogus purchases which had no relation with reasons recorded and the AO based on material on record could not have formed an opinion that the income has escaped assessment, while in the instant case before the tribunal reasons were recorded based on information received from DGIT(Inv), Mumbai w.r.t. assessee un-holy involvement with 28 bogus entry providers wherein the assessee is beneficiary of bogus entries of purchases to the tune of Rs.2,39,83,261/-. The Court in the case of Varshaben Sanatbhai Patel(supra) held that reasons recorded cannot be supplemented in the affidavit or by the order rejecting the objections , which is not the case in the instant

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appeal. The other decisions relied upon by the assessee are also not applicable to the facts of this case. In the case of Signatures Hotels Private Limited(supra), the AO received information from DIT(Inv.) that the loan of Rs. 5 lacs received by the assessee was accommodation entry but it did not specify any reference to document or statement on the basis of which such conclusions was drawn that income has escaped assessment , while in the instant case there is an information received from DGIT(Inv.),Mumbai which is backed with information from Maharashtra Sales Tax Department that there are 28 entities through whom assessee made bogus purchases of material as these entities were engaged in providing accommodation entries only without supplying any material, which in turn was also supported by deposition's by way of affidavit/statements of these 28 hawala entry providers. Similarly , in the case of Eveready Industries India Limited(supra), the genesis of the additions are the statement of a common director that certain payments made by tax-payer were accommodation entries, while the re-opening was done by AO where there was no definite or specific material before the AO to come to conclusion that income has escaped assessment , while in the instant case before us there were definite tangible and material incriminating information before the AO based on information received from the DGIT(Inv) , Mumbai which is backed with information from Maharashtra Sales Tax Department that there are 28 entities through whom assessee made bogus purchases of material as these entities were engaged in providing accommodation entries only without supplying any material, which in turn was also supported by deposition's by way of affidavit/statements of these 28 hawala entry providers. While, we are conscious that the reassessment notice should not have been routinely issued, at the same time, the nature of power is wide enough that when there is an escapement of income and the Revenue has information ruling that this escapement is also relatable to suppression of material facts (which could include false claims), the power to reopen concluded assessment can validly be exercised . This contention is supported

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by decision of Hon'ble Delhi High Court in the case of Principal CIT v. Paramount Communication Private Limited (2017) 79 taxmann.com 409(Delhi) . Thus, Respectfully following the decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited(supra), we hold that re-opening of the assessment as done in the instant case by the AO u/s 147 of 1961 was valid and legal which is upheld by us , and the contentions of the assessee are , hereby, rejected. No contrary decision of Hon'ble Apex Court is brought to our notice . This ground of the assessee challenging legality and validity of re-opening is hereby dismissed. We order accordingly.

11. Now, coming to the merits of the case, we have observed that the assessee is dealing in the business as supplier in ferrous and non-ferrous. The genesis of the case is the Information which was received by the A.O. from DGIT (Inv.), Mumbai that there are some parties who are engaged in hawala transactions and are involved in issuing bogus bills for sale of material without delivery of goods, which information was based on information received from Maharashtra Sales Tax Authorities that the assessee is beneficiary of hawala/accommodation entries for bogus purchases from 28 entry providers to the tune of Rs. 2,39,83,261/- from these accommodation entry providers . The accommodation entry providers had deposed and admitted before the Maharashtra Sales Tax Authorities vide their statement/affidavits that they were engaged in providing bogus accommodation entries where in bogus sale bills were issued without delivery of goods , in consideration for commission. These accommodation entry providers , on receipt of cheques from the parties against bogus bills for sale of material , later on withdrew cash from their bank accounts which was returned to beneficiaries of bogus bills after deduction of their agreed commission . The assessee was stated to be one of the beneficiaries of these bogus entries of sale of material by these 28 hawala entry operators in favour

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of the assessee to the tune of Rs.2,39,83,261/- , wherein the assessee made alleged bogus purchases to the tune of Rs.2,39,83,261/- through these bogus bills issued by hawala entry providers in favour of the assessee. These dealers were surveyed by the Sales Tax Investigation Department whereby the directors of these dealers have admitted in a deposition vide statements/affidavits made before the Sales Tax Department that they were involved in issuing bogus purchase bills without delivery of any material. There is a list of 28 such parties wherein the assessee is stated to be beneficiary of bogus purchase bills to the tune of Rs.2,39,83,261/-. It was observed by AO that these parties just issue bogus bills in lieu for earning commission without actual supply of goods. In an sworn Affidavit Cum Declaration filed before Sales Tax Investigation Branch, Mumbai and in deposition before the Assistant Commissioner of Sales tax, Investigation Branch, Mumbai ,the directors of the said 28 entities have admitted of issuing only invoices for sake of entry without delivery of goods. The Directors of the said 28 entities stated in their sworn affidavit that they had only supplied bills on receipt of cheques and later on cash was withdrawn from banks and after deduction of agreed commission, balance money was returned in cash to the assessee. The details of the aforesaid bogus parties from whom the assessee is stated to have purchased material are as under:-

ASHTAVINAYAK SALES AGENCY	AFWPN2169J	2008-09	21,194
STELCO STEEL INDUSTRIES	AFYPJ0025K	2008-09	371,948
RELIANT METAL CORPORATION	ALAPR6303A	2008-09	468,667
PADMAVATI METAL &ALLOYS	AFSPJ4124P	2008-09	556,674
JINESH METAL CORPORATION	ARDPK1291P	2008-09	48,140
RATNAJYOTI METAL & TUBES PVT. LTD	AADCR3441A	2008-09	135,742
ANIKET STEEL PVT. LTD.	AAGCA0417J	2008-09	779,845

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RELIABLE METAL (INDIA)	AJNPD6596Q	2008-09	957,436
TYSON STEEL AND TUBES PRIVATE LIMITED	AACCT9481B	2008-09	1,131,749
VIGNESHWAR IMPEX	ARDPK1294J	2008-09	1,133,295
RISHAB METAL (INDIA)	AACPJ6417C	2008-09	115,573
RAMANI METAL CORPORATION	AIRPD5688A	2008-09	246,607
POOJA METAL & ALLOYS	ACYPC4975E	2008-09	793,199
MAZDA STEEL TRADE PVT. LTD.	AAECM1196L	2008-09	49,462
ARIHANT TRADE LINK	BDRPS0342C	2008-09	320,881
TAMAS STEEL & ALLOYS PVT. LTD.	AACCT1556F	2008-09	1,122,116
KANAK STEEL (INDIA)	AFYPB6058G	2008-09	1,351,280
WEL STEEL (INDIA)	AHZPD3657L	2008-09	2,651,855
TAKSHIL TRADING PVT. LTD.	AABCT5406H	2008-09	112,829
RAJESHWARI TRADING PVT. LTD	AACCR7829M	2008-09	2,569,340
RANAKPUR SALES CORPORATION	BABPS6817D	2008-09	198,640
ELECON IMPEX PVT LTD	AABCE6233E	2008-09	246,395
NAVRATAN METAL IMPEX	AAIHM5090A	2008-09	256,513
PRIYA STEEL CORPN	AKCPD1838M	2008-09	530,244
VANDNA METAL SYNDICATE	AEWPJ3208B	2008-09	833,173
POOJA STEEL & ALLOYS	ACSPC2231P	2008-09	1,369,290
NAVODAY TRADE IMPEX PVT LTD	AACCN3641F	2008-09	2,024,972
VISHESH STEEL SUPPLIERS	AXVPS3398H	2008-09	3,586,202

Notices u/s.133(6) of the Act were issued by the AO to all the above 28 parties. All these notices except one notice were either returned un-served or were not replied to. Only one party namely M/s Ranakpur Sales Corporation, categorically stated that they have not supplied any material to the assessee concern. The A.O. asked the assessee to produce the parties but the assessee

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failed to produce the parties. The parties were not produce even before learned CIT(A) . The assessee also failed to produce suppliers, transporters or brokers before the AO for verification and enquiry. The assessee did not ask for the cross examination of Ranakpur Sales Corporation. The assessee was specifically asked to produce original bills and vouchers, all original documentary evidence of movement of goods for verification, details and documentary evidence of delivery challans, vehicle numbers, weighment slips, details of godowns, details of octroi payment etc. . **However, the assessee did not produce the original documents before the A.O. . The assessee also did not file documents for showing movement of goods from supplier to assessee and from assessee to customer as evidence although it stated in its reply that said documents are being filed.** The assesee did not submitted documentary evidence to show that there was movement of goods. The AO observed that the assessee filed delivery challan in one case only and that too there was no mention of transportation details. It was observed that the assessee has not submitted confirmations from these parties nor transportation details of the material purported to be purchased from these suppliers were furnished . Statement of purchase and sales showing name of the supplier and customers, date of purchase and sales , quantity purchased and sold to show one to one co-relation between purchases and sales were submitted by the assessee before the AO. The assessee also submitted VAT audit report. It was submitted that sales are fully vouched and without purchases, there cannot be sales and hence all purchases are genuine. The stock register for full year and ledger copy of the suppliers were also submitted and the assessee was able to quantitatively reconcile the sale and purchase of material. The assessee has also made the payments for these purchases through cheque for which evidence has been produced. It was submitted that there was no cash deposit in the bank and the payments have been made by the assessee to selling parties by account payee cheques. . It was held by authorities below that since the assessee had made sales which

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were duly quantitatively reconciled by the assessee with purchases , the purchases were made by the assessee but the same were made at low price from grey market and to cover deficiencies in documents, invoices were obtained from these 28 suppliers who issued bogus bills to the assessee without supplying any material. Thus, the AO held that the assessee failed to prove the onus cast upon it to prove that purchases to the tune of Rs. 2,39,83,261/- made by the assessee were genuine purchases , which were held by the authorities below to be bogus purchases as no material was supplied to the assessee by these suppliers which material in-fact was purchased from grey market at lower price which led to higher margin of profits which need to be estimated and added to the income of the assessee . The learned CIT(A) confirmed the additions. These are information which are especially in the knowledge of the assessee and the onus is on the assessee to prove that purchases are genuine as these purchases are recorded in the books of accounts of the assessee. Section 106 of Indian Evidence Act ,1872 clearly stipulates as under:

> **"106. Burden of proving fact especially within knowledge**
>
> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
>
> Illustrations
>
> (a)****
>
> (b) A is charged with traveling on a railway without a ticket. The burden of proving that he had a ticket is on him."

The assessee was not able to discharge burden cast u/s 106 of 1872 Act as **the assessee did not produce the original documents before the A.O.** . **The assessee also did not file documents for showing movement of goods from supplier to assessee and from assessee to customer as evidence although it stated in its reply that said documents are being filed.** The

assesee did not submitted documentary evidence to show that there was movement of goods. The assessee filed delivery challan in one case only and that too there was no mention of transportation details. The assessee did not file confirmations from these parties nor transportation details of the material purported to be purchased from these suppliers were furnished . The parties were also not produced before the authorities below. The only party who responded to notice u/s 133(6) of 1961 Act issued by the AO namely Ranakpur Sales Corporation deposed against the assessee. The assessee did not ask for cross examination of Ranakpur Sales Corporation who appeared before the AO in response to notice u/s 133(6) of 1961 Act and deposed against the assessee by confirming that bogus bills were issued by them in lieu of commission while no material was supplied against bogus invoices raised by them. The right of cross examination is not absolute. The assessee has to first discharge its primary onus cast under law and if the same stood duly discharged which is not rebutted by authorities , but despite that then also the authorities proceed to put assessee to prejudice solely relying on the basis of incriminating statement recorded of third party at the back of the assessee, then certainly the right to cross examination the said third party whose incriminating statement recorded at the back of the assessee is relied upon by authorities to prejudice the assessee will become absolute. But in the instant case , primary onus cast on the assessee itself did not stood discharged by the assessee as discussed above. The A.O. made gross profit additions @ 12.5% over the total bogus purchases of Rs. 2,39,83,261/- , which were held to be non-genuine by the authorities below, which addition came to Rs. 29,97,908/- which addition was confirmed by the learned CIT(A). . In such circumstances ,GP ratio needs to be estimated which definitely involved some estimation/guess work but the said estimation/guess work should be fair , honest and rational keeping in view factual matrix of the case and cannot be arbitrarily applied at the discretion of authorities . We have gone through the case laws relied upon by the assessee. Reference is

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drawn to decision of Hon'ble Supreme Court in the case of Kachwala Gems v. JCIT (2007) 288 ITR 10(SC) , wherein Hon'ble Lordships held as under :

> ***"4.*** *The facts of the case are in a short compass. The appellant-assessee deals in precious and semi-precious stones. In the course of assessment, the Assessing Officer noticed the following defects in the books of account of the assessee :*
>
> > *"1. The assessee has not maintained and kept any quantitative details/ stock register for the goods traded in by the assessee.*
> >
> > *2. There is no evidence on record or document to verify the basis of the valuation of the closing stock shown by the assessee. The assessee is not able to prepare such details even with the help of books of account maintained, purchase bills & Sale Invoices.*
> >
> > *3. Provisions of section 145(3) are clearly attracted in this case.*
> >
> > *4. The genuineness of purchases to the extent of Rs. 42 lakhs (approx.) is not proved without any doubt.*
> >
> > *5. The GP rate declared by the assessee at 13.49 per cent during the assessment year is not a match to the result declared by the itself in the previous assessment years.*
> >
> > *6. M/s. Gem Plaza, engaged in local sales of similar goods declared voluntarily rate of 35 per cent in its assessment for the assessment year 1997-98.*
> >
> > *7. M/s. Dhadda Exports, another assessee dealing in same items, but doing export business declared GP rate of 43.8 per cent (even without considering the value of export incentives) in assessment year 1997-98."*
>
> ***5.*** *Thereafter, the books of account of the assessee were rejected by the Assessing Officer and he resorted to best judgment assessment under section 144 of the Income-tax Act. The Assessing Officer in the assessment order mentioned some comparable cases and was of the view that the case of the assessee is more or less having similar facts as that of M/s. Gem Plaza where the Gross Profit has been taken as 35.48 per cent. The Assessing Officer estimated the Gross Profit of the assessee as 40 per cent.*
>
> ***6.*** *The Assessing Officer further held that the assessee has shown bogus purchases in order to reduce the Gross Profits.*
>
> ***7.*** *In appeal, the Commissioner of Income-tax (Appeals) upheld most of the findings of the Assessing Officer, but reduced the Gross Profit from 40 per cent to 35 per cent.*

> ***8.*** *In further appeal, the Tribunal had given further relief to the assessee and reduced the Gross Profit rate to 30 per cent.*
>
> ***9.*** *The counsel for the assessee has submitted before us that the income-tax authorities wrongly held that appellant has shown bogus purchases, and the books of account were wrongly rejected.*
>
> ***10.*** *In our opinion, whether there were bogus purchases or not, is a finding of fact, and we cannot interfere with the same in this appeal. As regards the rejection of the books of account, cogent reasons have been given by the income-tax authorities for doing so, and we see no reason to take a different view.*
>
> ***11.*** *It is well-settled that in a best judgment assessment, there is always a certain degree of guess work. No doubt the authorities concerned should try to make an honest and fair estimate of the income even in a best judgment assessment, and should not act totally arbitrarily, but there is necessarily some amount of guess work involved in a best judgment assessment, and it is the assessee himself who is to blame as he did not submit proper accounts. In our opinion, there was no arbitrariness in the present case on the part of the income-tax authorities. Thus, there is no force in this appeal, and it is dismissed accordingly. No costs."*

The authorities below in the instant case did not made any industry comparisons to arrive at fair , honest and rational estimation of GP ratio , rather applied GP ratio of 12.5% on alleged bogus purchases which estimation was in addition to the normal GP ratio declared by the assessee in return of income filed with Revenue. The Revenue made aforesaid additions relying on the presumption that the material was in-fact purchased from grey market at a lower rate and to cover deficiencies in record, the invoices were procured from these entry operators to reduce the profit. It was also considered that there will be savings on account of taxes while procuring material from grey market. The authorities below relied upon decision of Hon'ble Gujarat High Court in the case of Simit P Sheth (2013) 356 ITR 451(Guj. HC) , which has estimated disallowance @12.5% of the disputed bogus purchases to meet the end of justice. The authorities below has not brought on record industry comparables nor any rational comparability vis-à-

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vis preceding years GP ratio are brought on record. There is no allegation brought on record by learned DR that similar additions were also made in the immediately preceding year . The assessee earned GP ratio as detailed hereunder for last three years :

Financial Year	% GP
2007-08	4.3%
2008-09	5.45%
2009-10	4.9%

The books of accounts were not rejected u/s 145(3) of 1961 Act by the Revenue . In the immediately preceding year i.e. assessment year 2008-09, the assessee earned GP ratio of 4.3% on total turnover , while for the year under consideration GP ratio earned was 5.45%. In our considered view and based on facts and circumstances of the case as discussed by us in details above, end of justice will be met in this case if GP ratio of 12.5% on alleged bogus purchases is added to income of the assessee against which credit for the declared GP ratio on the alleged bogus purchases will be granted by the AO after verification by the AO because of failure of the assessee to come forward to discharge primary onus cast upon him as detailed above for which assessee is to be blamed and in the midst of afore-stated un-rebutted allegation against the assessee and non discharge of primary onus, the declared lower GP ratio of 5.45% in the instant previous year under appeal cannot be accepted. Thus, in nut-shell we are inclined to adopt GP ratio of 12.5% on alleged bogus purchases in the instant case which in our considered view is fair, reasonable and rational keeping in view factual matrix of the case , while the assessee shall be granted credit of GP ratio declared on these bogus purchases in the return of income filed with the Revenue. The assessee gets part relief. We order accordingly

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12. In the result, appeal filed by the assessee in ITA No. 4463/Mum/2016 for assessment year 2009-10 is partly allowed as indicated above.

Order pronounced in the open court on 4th April, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांकः 04-04-2017 को की गई ।

Sd/- (C.N. PRASAD) JUDICIAL MEMBER	sd/- (RAMIT KOCHAR) ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 04-04-2017

व.नि.स./ R.K., Ex. Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai H" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**