



The Entire Law On Taxation Of Purchases From Suspicious Dealers

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1. Introduction

Bombay High Court in *Mahalaxmi Cotton Ginning Pressing and Oil Industries v The State of Maharashtra & Others* (2012) 51 VST 1 (Bom.) (HC) (SLP dismissed by the Supreme Court) dealing with set off under section 48(5) and 51(7) of the Maharashtra Value Added Tax Act, 2002. Issue before the court was when dealer collects the taxes and does not deposit it in the Government Treasury, can the purchased be entitled to set off of the said taxes. Validity of the provision was challenged. Upholding the validity of the provision the court held that Section 48(5) uses the expression “actually paid” in to the Government treasury. The words “actually paid” must receive their ordinary and natural meaning. There is no reason for the court to depart from the plain and ordinary meaning of these words when used in the context of section 48(5). To accept the contention that “actually paid...in the Government Treasury” should be read to mean the tax that ought to have been deposited but has not been deposited in the treasury would amount to rewriting the legislative provision. In the said judgement, a statement was made on behalf of the Sales Tax authorities that nearly 35,000 notices have been issued to hawala beneficiaries involving a quantum of nearly 1,000 crores rupees. The statement and affidavit was made before the Court that the State Government shall pursue action against selling dealers who have collected tax from purchasing dealers but have not deposited the same into the Government treasury. Statement was made before the Court that in cases of hawala transactions, recovery action and or prosecution would be initiated against such suppliers. The Sales Tax department is bound by the assurance given before the Court. As per the information on the website of Sales Tax authorities, i.e. ‘Mahavat’ www.mahavat.gov, a list of 2,162 alleged non genuine dealers who had issued false bills without delivery of goods as on April 2014 is put up. List of non-filers of CST is 93, 276, and that of VAT is 69,473 as on 15-07-2014.

Based on available information and information received from Sales Tax authorities, income-tax officials have issued notices to various assesses, a number of assessments have been completed, some under process and some may receive notice in due course. Assuming each of the alleged 35,000 beneficiaries must have dealt in two assessment years there would be at least 70,000 scrutiny assessments.

Therefore, I must congratulate the Chairman and the members of the Committee for selecting this very important subject **”Purchases from suspicious dealers-Taxation issues”** for today’s discussion.

2. **Whether a transaction of purchase is genuine or not is always a question of fact and the primary onus is on the assessee to prove the genuineness of purchases.**

2.1 As tax consultants, our efforts should be to make representation to minimise the tax liability within the frame work of law. Representation before tax authorities becomes very important, because once the addition is confirmed by the Tribunal, the Assessing Officer will levy the concealment penalty, and once the penalty is confirmed in

number cases, the department has started initiating prosecution proceedings. One can approach the High Court under section 260A of the Income-tax Act, 1961, only on substantial question of law and not on facts. Therefore, making a good representation before the Assessing Officer, drafting of grounds of appeal and statement of facts before Commissioner (Appeals) is very important. Many times, it is observed that assessee do not file or file inadequate and incomplete statement of facts. When the matter is taken up before the Tribunal or High Courts, grounds before Commissioner (Appeals), and statement of facts become very important part of record and evidence.

2.2. For today's discussion, I have divided the subjects in to twelve parts.

- (1) General principles;
- (2) Reassessment;
- (3) Revision;
- (4) Legal remedies and Right of information Act;
- (5) Penalties;
- (6) Prosecution;
- (7) Compounding of offences;
- (8) Waiver application;
- (9) Advantages of approaching the Settlement Commission;
- (10) Writ petition;
- (11) Implications under general law; and
- (12) Check lists

3. Taxation issues

3.1. Broadly there could be four types of dealers from whom the assessee might have purchased the goods;

- 1) Those registered dealers whose registration are cancelled either prospectively or retrospectively, on the said dealers admitting that they have not done genuine business but issued only invoice.
- 2) There could be genuine dealers but not deposited the tax collected to Government and now being unable to pay may file affidavit stating that they are hawala bill providers.
- 3) There may be some dealers who have done the actual sales and also issued bogus bills. Now they may say that I have issued only hawala bills.
- 4) Only bill providers

3.2. Direct Taxation issues may arise when the purchases are from suspicious dealers.

- (a) Whether entire purchases can be disallowed under section 37(1)?
- (b) Whether the assessee is entitled to deduction in respect of a reasonable price for purchase of the goods especially when sales are not doubted?
- (c) Whether the expenses on purchases can be disallowed under section 40A(3)?
- (d) Whether the outstanding amount can be added under section 68, 69 or 69C?
- (e) Whether peak credit can be considered to make the addition. If yes, whether of individual account or of all the alleged bogus purchases from all dealers together?
- (f) Whether books of account can be rejected under section 145(2)?

- (g) When books of account are rejected can there be a separate addition on account of GP, unexplained investment, peak credit etc.?
- (h) Whether set off for addition made for earlier year can be allowed for the current year?
- (i) If addition made in earlier year is allowed to be set off, whether penalty can be levied under Explanation 2 to section 271(1)(c)?
- (j) If the revised return is filed, what will be the implications on concealment penalty?
- (k) If books of accounts are held to be not reliable, can special audit be ordered by the AO?
- (l) Statement on oath of alleged suspicious dealers, implications on assessment and general law?
- (m) Statement on oath of assessee in the course of survey /assessment /or search proceedings
- (n) If additions are upheld, consequential relief under sections, Sections 80IA, 80IB, 80IB(10) etc.
- (o) In case of scrutiny assessments, whether receipt of notice under section 148 can be challenged by way of Writ under Art 226 of the Constitution of India?

4. Prima facie onus to prove genuineness of purchases is on assessee.

4.1 Initial burden is on the assessee to prove the genuineness of purchases.

CIT v. Korlay Trading Co Ltd (1998) 232 ITR 820(Cal.)(HC)

The genuineness of transaction was doubted by the AO. Purchase and sale of shares made through broker. The assessee furnished the name of the company, number of shares purchased, date of sale, amount of purchase and sale money etc. The assessee had discharged its initial burden. The claim of the assessee could not be denied merely because the broker, through whom the shares were purchased and sold, failed to produce his books. That does not mean that the transaction was not genuine. Loss on shares could not be disallowed.

4.2. The presumption of law is “what is apparent is real” - Duties of the authorities

CIT v. Adinath Industries (2001) 252 ITR 476(Guj.) (SLP dismissed) (2001) 247 ITR (St)35

AO issued notice on ground that purchase made by assessee were bogus. Duty of authorities to make necessary inquiry before arriving at conclusion. Court held that the AO could have unearthed the fact that seller was a bogus party by recording the statement of the bank manager, accountant or cashier or the party who introduced the seller to the bank but without any evidence and merely on the basis of withdrawal of amounts from the account of the seller the AO had drawn a presumption that the amount had come back in the assessee's hands. The assessee had produced the gate pass, receipt note, weight note, laboratory report and sample report. The matter was decided on appreciation of evidence. Deletion was held to be valid.

4.3. Records maintained as per Excise laws are important piece of evidence

Motipur Sugar Factory (P) Ltd v. CIT (1974)95 ITR 401 (Pat.)(HC)(409)

Seetarama Mining Co. v. CIT (1968) 68 ITR 1 (AP)(HC)

Shanker Rice Co. v. ITO (2000) 72 ITD 139 (Asr.)(SB)(Trib.)(158)

In above cases, the courts have taken the view that, records maintained by Central Excise Authorities/ Various State Govt authorities are important piece of evidence. Applying the same principle if sales tax authorities have taken the view that the purchases are bogus and if assessee has accepted the same. The order of Sales Tax authorities can be relied on by the AO to doubt the genuineness of the purchase

transactions. In such a situation the burden is on the assessee to prove that though the sales tax authorities have taken the view that purchases are genuine.

4.4. Shifting of onus on the department.

4.4.1 Babulal C. Borana v. ITO (2006) 282 ITR 251 (Bom)(HC)

The assessee has recorded the transaction relating to 50 M.Ts. of HDPE in the regularly maintained books of account and the assessee has offered explanation regarding the nature and source of investment but the same was not accepted. However, books of account were not rejected. Identity of vendor was disclosed, source of investment was explained. Held, amounts could not be added as unexplained investment only because the vendor denied the transaction. The Court held that though the assessee's contention that he had no bank account was found to be false, the disallowance was not justified. And the fact that Sales Tax was not paid by the party who sold the goods does not affect the genuineness of transaction.

4.4.2 ACIT v. Kishan Lal Jewels (P.) Ltd. (2012) 147 TTJ 308 (Del.) (Trib.)

The assessee while furnishing necessary information regarding the transactions and the aforesaid parties like purchase bills issued against goods purchased, sales- tax registration numbers of the parties, PANs, their confirmations and Bank statements showing the debit of the amount paid through Account payee Cheques to them in the account of assessee and credited in the Bank Account of sellers, had discharged its primary onus, thereafter the onus shifted on the department to rebut the same. Addition under section 69C was held to be not justified.

4.4.3 ITO v. Permanand (2007) 107 TTJ 395(Jd)(Trib)

AO cannot make addition on the basis of observations made by the Sales Tax department without conducting independent enquiries.

4.5. Evidences which can help an assessee to discharge his onus

Direct evidence

- Producing the books of accounts, bills, stock register, payment etc.
- Filing confirmation and producing parties.

Indirect evidence

- Delivery challans
- Lorry receipts
- Octroi payment
- Confirmation from broker
- Quantity tally
- Sales details
- Excise register, payment
- Confirmation from transport operator
- Godown rent and records maintained by godown keeper
- Bank accounts cheque clearance certificate
- Comparison of GP/NP
- Rate comparison
- Consumption details
- Amounts credited to respective Accounts
- Third party assessment orders
- Expert valuation etc.

5. Additions were held to be not justified.

5.1. CIT v. Nikunj Eximp Enterprises (P.) Ltd. (2013) 216 Taxman 171 (Mag.) (Bom.)(HC)

Sale to government department-Alleged bogus purchases-Sales not doubted, merely because suppliers not appeared before the Assessing Officer or Commissioner (Appeals), purchases cannot be disallowed.

5.2. CIT v. M.K. Bros. (1987)163 ITR 249 (Guj.)(HC)

Purchases made by assessee. Subsequent statements by sellers in Sales Tax proceedings that they had issued bogus vouchers. No evidence that bogus vouchers were issued to assessee. Payments by account payee cheques. Amount represented purchases cannot be disallowed.

5.3. YFC Projects (P) Ltd. v. DCIT (2010) 46 DTR 496 (Delhi)(Trib.)

Non filing of confirmation. Certificate from Bank. AO was not justified in making disallowances of purchases made by the assessee merely due to non filing of confirmation from suppliers especially when the assessee has filed certificate from bank indicating the facts the cheques issued by it were cleared and no defects in the books of account was pointed out.

5.4. Rajesh P. Soni v. ACIT (2006) 100 TTJ 464 (Ahd.) (Trib.)

Addition under section 69 was not justified merely because suppliers could not be located and were not produced for examination.

5.5. J. H. Metals v ITO (2001) 77 ITD 71(TM)(Asr.)(Trib.)

Scrap purchase made in cash from kabarias who did not issue bills, on internal vouchers. GP was normal. Stock register was maintained. Addition as bogus purchases was deleted.

5.6. Vijay Proteins Ltdv.ITO (1996) 58 ITD 428 (Ahd.)(Trib.)

Assessee-company having failed to prove genuineness of transactions with 33 suppliers of oil cakes either by producing them or brokers or transports, Assessing Officer's findings that sales invoices, vouchers for freight payments in respect of purchases were all fictitious ones, were justified. Assessee having failed to prove that such oil cakes were received from outside Gujarat State, as shown in aforesaid invoices, disallowance by Assessing Officer of entire freight charges in relation to aforesaid purchases had to be confirmed. Addition made on account of purchases of oil cakes shown as made from 33 bogus suppliers could adequately cover unexplained peak amount of investment made in purchase of such oil cakes, and no separate addition could be made in respect of closing credit balances found against some of those bogus suppliers. Detection by Assessing Officer of serious mistakes found in vouchers produced by assessee and that too, of a large amount, justified rejection of assessee's books of account and consequently lump sum addition, based on results of percentage of yield of oil and oil cakes declared by assessee itself in preceding and subsequent years, was justified and had to be confirmed.

No appeal was filed against this order. However, in one of the orders wherein this order was relied on went to High Court. High court referred the decision and approved the decision.

- 5.7. CIT v. Bholanath Poly Fab Pvt. Ltd. (2013)355 ITR 290 (Guj.)(HC)**
Trading in finished fabrics. Only profit element is liable to tax.
- 5.8. CIT v. Simit P Sheth (2013) 356 ITR 451 (Guj)(HC)**
Trading in steel. Some purchases are bogus. Estimation of profit is only held to be justified.
- 5.9. CIT v. Sanjay Oil Cake Industries v. CIT (2009) 316 ITR 274 (Guj.)(HC)**
- Purchase of oil cake. AO had information that these parties are hawala entry givers- Entire purchases were added. Tribunal restricted to 25% of purchases as profit of assessee. Both the assessee and Revenue filed an appeal before the Court. High Court affirmed the view of Tribunal.
- 5.10. ITO v. Eagle Impex (ITA no 5697/Mum/2010 (AY. 2003-04) Bench “H” dt 22-02-2013(Unreported)**
Partnership firm doing business of manufacturing/ trading and export of stainless steel cutlery. Both local sales as well as export. Purchases from four parties. In response to notice under section 133(6) none of them appeared. Enquiry by inspector revealed that five parties could not be located at the given address. AO added/ disallowed entire purchases. Assessee produced the following documents,
- (a) Copies of purchase invoice,
 - (b) Copies of bank statements depicting payments made by way of account payee cheques,
 - (c) Quantitative disposal of these purchases showing corresponding export made out these purchases,
 - (d) Copies of export invoices bill of lading, foreign inward remittance certificate,
 - (e) Sales tax registration certificate both under the Maharashtra Sales Tax Act as well as the Central Sales Tax Act in respect of some of these parties,
 - (f) PAN of one of the parties
 - (g) Ledger account of the parties, their confirmation etc.,
 - (h) Certificate of Bank certifying that account payee cheques issued by the assessee have indeed been encashed in the bank accounts of the very same parties,
 - (i) Copies of account payee cheques issued by the assessee and their encashment along with recipient banks stamp etc.,
 - (j) Documents of sales tax Registration of various parties under the B.S.T. and Central C.S.T including verification report of sales tax inspector, parties affidavit etc.
- In appeal CIT (A) following the ratio of Ahmedabad Tribunal in Vijay Proteins Ltd v. ACIT (1996) 58 ITD 428 (Ahd)(Trib) disallowed only 25% of purchases. Assessee and department filed appeal to the Tribunal. Tribunal held that the assessee has discharged the primary onus which laid upon the assessee, though the assessee failed to put up the any appearance of the parties before the AO. It was upon the AO to prove that the documents are not genuine. AO never stated that the documents were bogus. Addition confirmed by the CIT (A) was also deleted and the appeal of assessee was allowed.
- Department is in appeal before Bombay High Court and the appeal is pending for admission.
- 6. Duty of the AO to issue a show cause notice calling upon the assessee to furnish explanation before disallowing the claim.**
Gujarat Zenith Processing Mills v. CIT (1996) 219 ITR 721 (Guj.)(HC) (726)

It is an inherent part of section 143(3), that where the AO is not inclined to accept the return submitted by the assessee and if he wants to modify the assessment from the return, a show-cause notice is required to be given to the assessee. It is mandatory for an AO to issue a show cause notice, before disallowing the expenses.

7. Obligation of the assessee-Specific request in writing before the AO to

- Summon the supplier
- Give an opportunity to examine him on oath
- Inspect his books of account
- Verify his proofs
- Examine his banker
- Cross check with his AO
- Cross check with the STO
- Cross check with other Govt agencies

8.1. CIT v Hi Lux Automotive (P.) Ltd. (2009) 23 DTR 385 / 183 Taxman 260 (Del) (HC)

The reason for disallowing expenditure in respect of other four parties was that when the notices were sent they were not available. We are of the opinion that even in their absence the assessee had produced sufficient material to show payments, namely the bank accounts of such parties. We are constrained to note that if the summons are not issued to those parties or the same could not be served at the given addresses, the Assessing Authority could have obtained their addresses from the banks as the bank statements were produced and could have made an endeavour to serve those parties at the said addresses. Once quantitative tally of sales is furnished, the same should be accepted. It is not open for Assessing officer to disregard the same, Assessee having made payment of raw material purchase from two parties by means of A/c payee cheques and produce bank statement showing the payments. No addition could be made.

8.2. Hon'ble Supreme Court in the case of **Tin Box Co. v. CIT (2001) 249 ITR 216 (SC)** "an assessment made without giving the assessee an opportunity of setting out his case was liable to be set aside".

8.3 The Hon'ble Supreme Court observed in the case of **Dhakeswari Cotton Mills Ltd. v. CIT (1954) 26 ITR 775 (SC)**, if the AO proposes to use any material against the assessee, which is obtained by private enquiry, it should have been communicated to the assessee so as to know full particulars of the case and the failure to do so vitiates the case of the Revenue.

8.4 CIT v. Eastern Commercial Enterprises (1994)210 ITR 103 (Cal.)(HC)

The assessee is entitled to cross-examine the person who was examined by the A.O. Cross –examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against a party unless the party is put on notice of the case made out against him. He must be supplied the contents of all such evidence both oral and documentary, so that he can prepare to meet the case against him. This necessary also postulates that he should cross –examine the witness hostile to him.

8.5 CIT v. J. M. D. Communications P. LTD (2010) 320 ITR 17 (ST) (SC) (ITA NO 106 OF 2007 DT 16-1-2009(Delhi)(HC) .

Person who has issued the bills has given the statement that he was carrying on the business of issuing bogus accommodation bills on commission basis with the assessee, and this was not put to the assessee for rebuttal or cross-examination, High Court held no substantial question of law. On SLP by revenue the Court held that if the AO wants to use some statement made before him, then on request by the assessee, is bound to put the deponent for cross examination.

8.6. Kishinchand Chellaram v. CIT (1980) 125 ITR 713 (SC)

Though the proceedings under the Income-tax Act are not governed by the strict rules of evidence, the department is bound to afford an opportunity to controvert and cross examine the evidence on which the department places its reliance. Opportunity of cross examination must be given. The consequence of breach of natural justice is that either the addition is void or matter may have to be remanded to lower authorities.

9. Display of information on website of VAT authorities cannot be the sole ground for rejecting the claim of assessee

9.1 Just on the Information from Sales Tax Department and on the statement of any party and without actually verification and putting on record and without giving an opportunity of cross examination, the purchases from such suspected parties cannot be disallowed by the I.T. Department, i.e. the crux of the matter is that the third party information or evidence should not be the sole basis for conclusion of a matter.

9.2. DCIT v. Shri Rajeev G. Kalathil, (Mum) (Trib) (ITA No. 6727/M/2012 dt. 20/8/2014, Bench 'D' AY .2009-10)

Suspicious purchases – Name on website of Sales Tax Department as hawala dealer not enough to disallow purchases.

Held, the AO had made the addition as one of the suppliers was declared a hawala dealer by the VAT Department. The Tribunal observed that this was a good starting point for making further investigation and to take it to its logical end. But, the AO left the job at initial point itself. It was further held that suspicion of highest degree cannot take place of evidence and the AO could have called for the details of the bank accounts of the suppliers to find out whether there was any immediate cash withdrawal from their account. Transportation of good to the site is one of the deciding factors to be considered for resolving the issue and the CIT (A) had given a finding of fact that part of the goods received by the assessee was forming part of closing stock. Furthermore, since the proof of movement of goods is not in doubt and there is nothing in the order of the AO about cash trail, disallowance could not be made.

9.3. ITO v. Permanand (2007) 107 TTJ 395 (Jd) (Trib)

AO received information from the Sales Tax Department that the purchases made by the assessee from two parties were bogus. Solely relying on the same, AO made addition under s. 69. Tribunal held that no addition can be made in the hands of the assessee merely on the basis of observations made by a third party. While making the assessment, it is the satisfaction of the AO which is of prime importance. It cannot be substituted by the satisfaction of someone else. Assessee has discharged the primary onus cast on him by showing the purchases in the books of accounts, payment by way of account payee cheques and producing the vouchers of sale of goods. AO did not make requisite investigations against the said sellers. Moreover, no opportunity was given to the assessee to confront the sellers. Addition rightly deleted.

- 10. Affidavit of the supplier, subsequent to disowning, accepting the transaction will discharge the obligation of the assessee.**
Mere affidavit will not discharge the burden. Supreme court in **Mehat Parikh & Co v. CIT (1956) 30 ITR 181 (SC)** had held that when an affidavit is filed, the same is proved to be correct unless it is proved to otherwise. Once affidavit is filed, if the AO is not ageing with the contents, the assessee can ask the AO to issue summons. If summons issued and statement is recorded and the person affirms what is stated in the affidavit is correct. The burden is discharged. In spite of issuing summons the one who has given the affidavit does not present himself, the affidavit will not help the assessee.
- 10.1. Kunal Surana v. ITO (2014) 144 ITD 195(Mum.)(Trib.)**
Mumbai Tribunal rejected the affidavit on the ground that it was not in the proper form. It desirable that professionals may read this judgement before preparing an affidavit.
- 11 Once sales of the assessee are accepted whether purchase can be doubted?**
- 11.1. G. G. Diamond International v Dy. CIT (2006) 104 TTJ 809 (Mum.) (Trib.)**
It is not case of the Revenue that the assessee is not maintaining books of account. The purchases are recorded in the books of account. Payments are made by cheque to the immediate purchasers. They accepted and confirmed the sale. To hold otherwise, there should be some evidence in the possession of the Revenue. Suspicion, however strong, cannot take the place of evidence and that alone cannot be the criteria for deciding the matter.
- 12. Addition to be restricted to rate of Gross Profit or the entire purchases to be disallowed**
CIT v. President Industries (2002) 258 ITR 654 (Guj.)(HC) (655)
Only profits embodied on sale proceeds can be taxed.
- 13. CIT v. Balchand Ajit Kumar (2003) 263 ITR 610 (MP)(HC)(612-613)**
Suppressed sale cannot be the income only net profit can be assessed.
- 14. Sanjeev Woolen Mills v. CIT (2005) 279 ITR 434 (SC)**
It is a settled principle of income–tax law that it is the real income which is taxable under the Act.
- 15. CIT v. Leaders Valves (P) Ltd. (2006) 285 ITR 435(P&H)(HC) Scrap dealers case**
wherein consumption stood fully proved, therefore the addition was deleted.
- 16. Shri Madhukant B. Gandhi v. ITO ITA no 1950 /M/2009 Bench “B” dt. 23/2/2010(AY. 2005-06) (Mum.)(Trib.)**
The A.O. treated parties as bogus and made total disallowances. ITAT restricted the disallowance to 5% only in respect of the disputed purchase.
- 17. DCIT v. Shri Jitendra S. Motani , ITA Nos. 3024 to 3028 Bench “J” dt 4-08-2009 (AYs 2000-01 to 2005-06) and ITA no 6178/M/ 2007 dt. 30-11-2011 Bench “J” (AY. 2004-05) (Mum)(Trib.)**

The AO made disallowance of entire purchases. Only few parties filed confirmations. CIT (A) applied 3% to GP to all the purchases. The payments were made by A/c payee cheque. The ITAT held that addition restricted to 3% on tainted purchases only (i.e. where no confirmation was obtained or doubtful in nature).

Note-Tribunal considered the Delhi High Court CIT v. La Medica (2001) 250 ITR 575 (Delhi) which is against the assessee, which was distinguished by Delhi High Court in CIT v. Hilux Automotive (P) Ltd. (2009) 23 DTR 385/183 Taxman 260(Delhi)(HC)

18. Applicability of provisions of section 40A(3) in case of purchases. ITO v. Nardev Kumar Gupta (2013) 142 ITD 303/ 22 ITR 273 (Jaipur) (Trib.)

Best judgment-No disallowance under section 40(A) (3).

The assessee derived income from commission from newspaper agency sales and purchases. He filed his return on March 31, 2010. The Assessing Officer observed that the assessee made sales in cash and while making the best judgment assessment accepted the sales showed by the assessee but applied a higher gross profit rate and made addition in respect of income from newspaper business. He also made trading addition under section 40A(3) of the Act, on the ground that the assessee made cash payments to the newspaper company. The Commissioner (Appeals) deleted the addition on the ground that when income was assessed by estimating the profit after rejection of the books of account no disallowance could be made separately under section 40A(3) of the Act. On appeal by the Department the Tribunal held, that the Commissioner (Appeals) rightly deleted the separate addition made by the Assessing Officer under section 40A(3) of the Act. (A.Y. 2009-2010)

19. S.40A(3):Expenses or payments not deductible - Cash payments exceeding prescribed limits -There is a difference between “crossed cheque” and “account payee cheque”. Payment by crossed cheque attracts S. 40A(3) disallowance.

Rajmoti Industries v. ACIT (2014) 223 Taxman 428/268 CTR 130/103 DTR 113(Guj.)(HC)

The expression earlier used in s. 40A(3)(a) was a “crossed cheque or a crossed bank draft”. This was amended by the legislature to be replaced by the expression “an account payee cheque or account payee bank draft”. This was done in the background of the experience that even crossed cheques were being endorsed in favour of a person other than the drawee making it difficult to trace the constituent of the money. To plug this possible loophole, the requirement of section 40A(3) was made more stringent. If we accept the contention of counsel for the assessee that there was no distinction between a crossed cheque and an account payee cheque, we would be obliterating this amendment brought in the statute with specific purpose in mind. Accordingly, payment by a crossed cheque is subject to disallowance u/s 40A(3).(AY. 2007-08)

Amendment is with effect from 13-07-2006; earlier words were “Crossed cheque drawn on bank or crossed bank drafts”

20. : CIT .v. Nangalia Fabrics P. Ltd. (2014) 220 Taxman 17 (Mag.)(Guj)(HC.)

S.68: Cash credits-Bogus purchases – payment made by cheques- -Sales accepted-Purchases cannot be held to be bogus.

The Assessee had made certain purchases. On account of unverifiable purchases, the Assessing Officer made additions to the tune of Rs. 1.27 crores. He was of the opinion that none of the parties could be located and therefore, such purchases were held to be bogus. When it was challenged before the CIT (A), the CIT(A) was of the opinion that they could not be held bogus as the corresponding sales had been effected by the respondent in the next year. In subsequent year also and in the past, such purchases were made which were never questioned. When challenged before the Tribunal on the basis of the facts presented before us, it held that these purchases could not be held bogus. The High court held that the issue is essentially based on facts. The Tribunal, having been satisfied by genuineness of the purchases as also considering the payments made through the cheques, was of the opinion that such addition could not be sustained. Issue, essentially and pre-dominantly based on facts, requires no consideration as no question of law arises.

21. ACIT v. Arya Texturisers & Twisters (ITA N0. 29/ Mum/02 Bench B dt 3-12-2005 (AY. 1998-99)(Mum.)(Trib.)

Purchase of grey cloth from Bhivandi parties. The AO made addition of Rs.2,86,80,336/- u/s. 69 in respect of 13 parties from whom the purchase of grey cloth was made.

The assessee claimed that the grey cloth was processed and sold to sister concern. The purchase parties were not traceable, only few parties filed confirmation. However the payments were made by crossed bearer cheques. The ITAT ultimately held that only G.P. addition of 3.2% should to be taken on the sales made against these purchases.

The facts of assessee's case are far better, as the parties are traceable, payment are made by A/c. payee cheques, excise and sales tax record were produced, no unaccounted stock was found in books or during physical inventory during survey.

22.CIT .v. Bholanath Poly Fab (P.) Ltd. (2013) 355 ITR 290 /40 Taxmann.com 494 / (2014) 220 Taxman 82 (Mag.) (Guj.)(HC)

S. 69 : Unexplained investments–Purchasers not traceable –Profit element embedded in purchases.

Assessee is engaged in the business of trading in finished fabrics. Assessing Officer disallowed the purchases on account that parties from whom purchases were made are not found at the addresses given. CIT(Appeals) confirmed the assessment order. Tribunal held that purchases were made from bogus parties, but the purchases themselves were not bogus as entire quantity of opening stock, purchases and the quantity manufactured during the year under consideration were sold by the assessee. Therefore, Tribunal held that additions should not be the entire amount, but the profit margin embedded on such purchases would be subjected to tax. On appeal by revenue to High Court, Tribunal's order was upheld. (AY 2005 - 06)

21. Provisions of S.69C cannot be applicable in case of the purchases.

CIT v. Kashiram Textile Mills (P) Ltd (2006) 284 ITR 61 (Guj.)(HC)

Addition were made to the income of the assessee on the ground that the purchases were fictitious. The Tribunal found that there was no evidence to say that the purchases were bogus. Deletion of addition was held to be justified. Provision of section 69C cannot be made applicable.

22. **Dy.CIT v. Kirtilal Kalidas Jewellers (P.) Ltd. (2012) 54 SOT 529 (Chennai)(Trib.)**
Purchases recorded in the books of account though did not carry the address of parties cannot be treated as unexplained purchases
During assessment proceedings, Assessing Officer found that for some of purchases effected by assessee, no details or address of vendors were available in purchase vouchers. He, therefore, considered such purchases to be non-genuine and an addition was made on that account. Since purchases were recorded in books of account of assessee and were also shown in its stock, in such circumstances merely because those purchases did not carry full addresses of vendors, could not be a reason to treat the said purchases as unexplained. Therefore, impugned addition made by Assessing Officer was to be deleted.
23. **AIT v. KishanLal Jewels (P.) Ltd. (2012) 147 TTJ 308 (Delhi)(Trib.)**
Provision of section 69C cannot be applied. Entries were made in the regular books of account. No allegation that the rates of various items stated in the purchase invoices are understated and the supplier concerns were found to be genuine concerns. GP rate was normal.
24. **Traders**
ITO v. Surana Traders (2005) 92 ITD 212 (Mum.)(Trib.)
Where a quantitative tally of sales furnished, even if purchasers are not available, no addition can be made merely on assumptions or presumptions or surmises or conjectures.
25. **Manufacturer**
25.1. **CIT v. Adinath Industries (2001) 252 ITR 476 (Guj.)(HC) [SLP rejected (2001) 247 ITR (St.) 35]**
In the present case, the details about purchases were furnished. The transactions were through a broker whose bill was produced. All the details from the stage of receipt to production were produced. For further verification the assessee produced gate pass, avakchitti (receipt note) and weight note. The assessee produced laboratory report and sample report. It pointed out the difference paid or recovered in view of reports. The assessee produced R. G. 4 form to show the details entered as per Excise Rules. The assessee pointed out the production and purchase of raw materials. The assessee submitted the details about the transaction, truck number, etc. Thus, the assessee produced relevant materials to show purchase of materials and its use in production.
- 25.2. **Dy. CIT v. Brahmputra Steels (P) Ltd (2002) 76 TTJ 447 (Gauthati)(Trib.)**
Assessee had maintained daily stock register in respect of purchase of raw materials and production of finished goods as required by the Central Excise Act and also furnished weekly, fortnightly and quarterly returns before authorities, factum of purchase of raw materials could not be disputed. Therefore, transactions of purchase of raw materials were genuine and accepted.
26. **Trading and Manufacturing**
Balaji Textile Industries (P.) Ltd. v. ITO (1994) 49 ITD 177 (Mum.)(Trib.)
Summons issued to 12 parties returned unserved. Payments were crossed cheque (Not account payee cheques)-No allegation that the amount was received back by assessee. Sales were accepted –No sales can be made without purchases. Addition was deleted.

27. Gems and Jewellery

Abhay Kumar Bharatkumar Shah v. ITO (Ahd.)(Trib.) dt. 18-1-2010 Bench 'B' (AY. 1998-99)

The genuineness of transactions of sale and purchase of diamonds and gold jewellery is accepted, and in view of the fact that the assessee has filed the details in respect of holding of the loose diamonds and gold jewellery, the declaration made by the assessee under VDIS, 1997 evidencing that the value declared was as per the valuation report of the approved valuer, which verify the fact that the assessee is holding loose diamonds and gold jewellery and the copies of bills, to prove the genuineness of sale, issued by purchaser of diamonds and gold jewellery and also supported the purchase bills by affidavits and even the sale consideration was received by banking channel by account payee cheque / draft, the transactions of sale in the hands of the assessee cannot be doubted. Accordingly, we accept the transaction of sale of loose diamonds and gold jewellery in the hands of the assessee genuine.

28. Non availability of the supplier at the last known address may not be the sole basis.

Rajesh P. Soni v. ACIT (2006) 100 TTJ 892 (Ahd.)(Trib.)

Purchases were recorded in the regular books of account maintained. The purchases are supported by proper bills/vouchers. The assessee filed the necessary details regarding name, address, sales-tax number. The payments were made through banking channels. Thus, the sales against purchases are not doubted. It is not the case of AO that amounts paid for purchases had come back to the assessee. AO had made addition merely on the ground that the suppliers are not located and they were not produced for examination. This is not a relevant factor.

29. CIT v. Allied Industries (2010) 229 CTR 462 / (2009) 31 DTR 323 (HP)(HC)

Additional income surrendered by the assessee firm having been added to the income of the business itself, it is to be considered while working the deduction under section 80-IB.

Re-opening

30. Web site of the sales tax constitute an 'information' for reopening?

Mere information on web site may not constitute the information, however, based on the same the return of the assessee is verified and after recording the reasons the notice is issued it may be valid information.

31.1 CIT v. Chhabil Das Agrwal (2013) 357 ITR 357/ 217 Taxman 143 (SC)

Reassessment-Alternative remedy-Writ petition to challenge a reassessment order should not be entertained. [S.148, Art 226]

The AO issued a notice u/s 148 reopening the assessment and pursuant thereto passed a re-assessment order u/s 147. The assessee filed a Writ Petition in the High Court to challenge the said notice and re-assessment order. The High Court entertained the Writ Petition and quashed the re-assessment order. On appeal by the department to the Supreme Court HELD reversing the High Court:

The Income-tax Act provides a complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities. The assessee cannot be permitted to abandon that

machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he has adequate remedy open to him by an appeal to the Commissioner of Income-tax (Appeals). As the said statutory remedy is an effectual and efficacious one, the Writ Court ought not to have entertained the Writ Petition filed by the assessee.

31.2 Kalanithi Maran .v. JCIT (2014) 107 DTR 1 (Mad.)(HC)

S. 147 : Reassessment–Notice and order on objections cannot be challenged in a Writ Petition.[S.148, Art. 226]

Recently, the Madras High Court held that writ petition cannot be filed by the assessee at the stage of issuance of notice u/s 148. However, this decision would not bind assesseees in states other than Tamil Nadu.(Writ Appeal No. 347 to 349 of 2014, dt.04.07.2014.)

31.3. Aroni Commercials Ltd. .v. ACIT (Bom.)(HC) www.itatonline.org

S. 147 : Reassessment – Writ Petition challenging lack of jurisdiction to issue notice on the ground that it is based on ‘change of opinion’ & preconditions of section are not satisfied, is maintainable.

The assessee filed a Writ Petition to challenge a notice issued u/s 148 to reopen the assessment. The department relied on the judgement of the Madras High Court in JCIT vs. Kalanithi Maran and argued that a Writ Petition to challenge a notice issued u/s 148 was not maintainable. HELD by the High Court rejecting the plea:

The argument, based on JCIT vs. Kalanithi Maran, that this Court should not exercise its writ jurisdiction under Article 226 of the Constitution of India and the petitioner should be left to avail of the statutory remedies available under the Act, is not acceptable. The decision of the Madras High Court in Kalanithi Maran proceeded on the basis that the dispute urged before it were with regard to adjudicatory facts and not with regard to jurisdictional facts as raised in this petition. The Madras High Court itself points out that that when an assessment sought to be reopened by an Officer who is not competent to do so or where on the face of it would appear that the reopening is barred by limitation or lacks inherent jurisdiction, the court would certainly entertain a challenge to the reopening notice in its writ jurisdiction. The Madras High Court itself drew a distinction between the adjudicating facts and jurisdictional facts. It was in the above context that challenges to the reopening notice u/s 147 and 148 of the Act was not interfered with by the Madras High Court as the challenge before it appears to have been with regard to adjudicating facts as contrasted with the jurisdictional facts raised in this case. Jurisdictional facts are those facts which give jurisdiction to enter upon enquiry, while adjudicatory facts come up for consideration after validly entering upon enquiry i.e. having jurisdiction. In this case, the challenge is based on lack of jurisdiction in issuing the impugned notice by the AO on the ground that the pre-condition for issuing notice u/s 147 of the Act is not satisfied i.e. notice should not be on account of the change of opinion. It is only when jurisdictional facts are satisfied will the AO acquire the authority to deal with the matter on adjudicatory facts. The decision of the Madras High Court is of no avail in the facts of the present case. It may be pointed out that there could be occasions where jurisdictional facts could itself be a matter of factual enquiry. i.e. leading of evidence and appreciation of facts. In such a case even if the challenge is with regard to jurisdictional facts, yet the Court in its discretion may not entertain the petition as it could be best left for determination before the authorities under the Act.(W.P. No. 1327 of 2013, dt. 16/08/2014.)

31.4. Pransukhlal Bros. v. ITO, ITA WP Lodging no. 2124 of 2014 dt. 20/8/2014, (Bom HC)

S. 148: Reassessment – Suspicious purchases – Disposal of objections – To be linked with recorded reasons.

Assessment of the assessee was reopened. The recorded reasons stated that the assessee had taken accommodation entries from a Surat based diamond concern and this information (according to the recorded reasons) was obtained by the Department from search and survey action on the said diamond concern. The assessee objected to the recorded reasons which were disposed off by the AO referring to investigation carried out by Sales Tax authorities, display of names of parties on the website of Sales Tax department. Held, since these facts were even remotely adverted to in the recorded reasons, the order disposing off objections was held unsustainable in law with fresh opportunity to AO to dispose off the objections keeping in mind the recorded reasons.

31.5. GKN Driveshafts (India) Ltd. v ITO [2003] 259 ITR 19 (SC). When notice under section 148 for reopening of assessment under section 147 is received by an assessee, he should immediately ask for a copy of the reasons recorded for reopening, because the AO is obliged to give the same and also consider the objections raised by the assessee to the reopening.

Asian Paints Ltd v. Dy. CIT (2008) 296 ITR 96 (Bom.) (HC)

Allana Cold Storage Ltd v. ITO (2006) 287 ITR 1 (Bom.) (HC),

Kamlesh Sharma (Smt.) v. B.L. Meena, ITO (2006) 287 ITR 337 (Delhi) (HC)

Assessee has to file objections. Assessing Officer has to dispose the objection. Assessing Officer should not proceed with assessment for 4 weeks thereafter. The assessee may decide whether to file writ petition or pursue normal legal remedies.

CIT v. Videsh Sanchar Nigam Ltd. (2012) 340 ITR 66 (Bom.) (HC)

If the AO fails to provide a copy of the reasons recorded till the completion of the assessment, though specifically asked for by the assessee, the reassessment order is invalid.

31.6. Beyond four years

CIT v. Kamdhenu Steel and Alloys Ltd. & Ors. (2012) 248 CTR 33 / (2014) 361 ITR 220 (Delhi) (HC)

Wherein observed that where the notice was issued after expiry of four years and the A.O. acted mechanically on the information supplied by the DIT (Inv.) about the alleged bogus / accommodation entries provided by certain individuals / companies without applying his own mind, he was not justified in invoking jurisdiction u/s. 147.

Nickunj Eximp Enterprises Pvt. Ltd. v. ACIT (2014) 107 DTR 69 (Bom) (HC)

In this case, even though regular assessment was carried out u/s 143(3) of the Act, notice u/s 148 was held not to be invalid beyond four years as there was specific information that the assessee had purchases from non-existent/ bogus billers. The High Court rejected the challenge to the issue of notice u/s 148 by way of writ on the ground that receipt of information that bills produced were not genuine gives rise to reasonable belief in the mind of the Assessing Officer that the income chargeable to tax has escaped assessment.

31.7. Kunal Organics P. Ltd. v. Dy. CIT (2014) 362 ITR 530 (Guj.) (HC)

-Reassessment–No limitation on number of times notice can be issued–Notice to tax guaranteed return and bonus on key man insurance–Proceedings dropped–Second notice to tax same sum- Two notices on same ground–Not permissible–Second notice was quashed.

In the return of income the assessee stated that guaranteed return and bonus on keyman insurance being contingent receipts were not offered to tax. Notice was issued under section 148. The assessee filed detailed reply and after considering the reply proceedings were dropped. Once again notice was issued to tax the said sum. The assessee once again made the detailed representation to drop the proceedings. The AO did not drop the proceedings. The assessee filed the writ petition. Allowing the writ the court held that Subject to limitation of not being permissible on change of opinion, there is no limitation on the number of times notice u/s.148 can be issued. When earlier reassessment proceedings were dropped, it amounts to inference that the AO is of the view that the additions are not sustainable, and hence, notice u/s.148 on the same ground is not permissible. The second notice was quashed. (AY. 1997-98)

32. Revision of orders prejudicial to revenue.

32.1 Whether Commissioner can revise u/s 263 the order of the AO, where claim has been allowed by him?

In cases where the order was passed by the AO by due application of mind, revision was not possible.

E.g. Assuming the AO has passed the order applying the GP the CIT cannot revise on the ground that entire purchases should have been disallowed.

Mundra Steel & Alloys Pvt. Ltd. v. CIT ITA no 1709 & 1710 /PN/2011 dt 20-9-2013 (AY. 2007-08, 2008-09)

Assessment was reopened on the basis of survey action, it was alleged that bogus bills were purchased from two parties. Transporter entry was not made in the octroi. Quantity tally was produced. AO considering the statement in the courses of survey and DDI report made addition of 20% to GP. Commissioner revised the order on the ground that there was statement of transporter that the bills were bogus. CIT set aside the order and directed the AO to once again re-examine the issue.

The Tribunal observed that “In our opinion, the Assessing Officer cannot be said to be a silent spectator but he understood the limitation within which he could deal with survey report of the DDI (Inv), with the permissible legal framework and accordingly accepted the alternative plea of the assessee and completed the assessment”. The CIT has not agreed with the view of the Assessing Officer that itself would not give jurisdiction to revised under section 263. Tribunal followed the ratio in **Malbar Industries Co Ltd v. CIT (2000) 243 ITR 83 (SC)**,

CIT v. Max India Ltd (2007) 295 ITR 282 (SC)

Ranka Jewellers v. Addl. CIT(2010) 328 ITR 148 (Bom)(HC)

CIT v. Gabril India Ltd (1993) 203 ITR 108 (Bom) (HC)

One may also refer the judgment of jurisdictional High Court in Grasim Industries Ltd. v. CIT (2010) 321 ITR 92 (Bom.)(HC)

Where two views are possible, revision is not permissible.

Remedies Available

33. Appeal.

-Appeal can be filed.

- One must be very cautious. E.g. Officer must have made only addition to GP. If assessee files an appeal there could be possibility of enhancement of Income. The CIT (A) has powers to enhancement.
- Assessee must prepare a detailed statement of facts. Statement of facts and grounds of appeal are the most important documents when the appeals are filed before the Tribunal and High Court.
- Certain wrong observations or facts in the assessment order have to be objected to in the statement of facts.
- If AO has not given a reasonable opportunity, a specific ground must be taken,
- Evidences used against assessee without proper opportunity or without giving copy of the same – specific grounds to be taken
- Grounds should also state how addition is not justified, alternative claim, natural justice, reassessment etc. must be taken.

34. Penalties.

34.1. CIT v. SAS Pharmaceutical (2011) 335 ITR 176 (Delhi)(HC)

Amir Chand v. ITO (1999) 49 ITD 606 (Delhi)(Trib.)

Dilip M. Shah v. ACIT(ITA No. 4413/M/98 dt.25-1-1999(A.Y. 1994-95) Bench (SMC)

If survey takes place and the amount is disclosed in the return, penalty cannot be levied. What is punishable under section 271(1)(c) is actual concealment in the return and not merely an attempt to make concealment.

34.2. Sadhbav Builders v. ITO ITA no 1418 /Ahd/2008, Bench ‘D’ 21-1-2011(2011) (BCAJ Jan-P. 480)

If due date has not expired and survey takes place and assessee offers the bogus purchases in the return, there will not be penalty under section 271(1)(c). Concealment of income must be in the return.

34.3. MAK Data P. Ltd. v. CIT (2013) 94 DTR 379/358 ITR 593(SC)

S.271(1)(c):Penalty-Concealment-Surrender of income after detection of incriminating documents-Satisfaction need not be recorded in particular manner-Voluntary disclosure-Under Explanation 1 to s. 271(1)(c), voluntary disclosure of concealed income does not absolve assessee of s. 271(1)(c) penalty if the assessee fails to offer an explanation which is bona fide and proves that all the material facts have been disclosed.

34.4. CIT v. Mahaveer Mirror Industries (P) Ltd (2013)353 ITR 553(Mad)(HC)

S.271(1)(c):Penalty–Concealment-Bogus purchases–Statement of seller denying the sales-Penalty held to be valid.

The seller, in his sworn statement, had stated that he had not made any sales and had given only bills to the assessee. The assessee had also not chosen to cross-examine the seller. The Tribunal as well as the appellate authority had not controverted or distinguished this fact by relying on any statement or material documents produced by the assessee. Assessment was adding only GP. Tribunal deleted. On appeal High Court reversed the order of Tribunal . Therefore, the levy of penalty was valid.

In following cases estimation of GP penalty cannot be leviable

CIT v. Mahendra Sigh Khedia (2012) 71 DTR 189/ 252 CTR 453 (Raj)(HC)

CIT v. Vijay Kumar Jain (2010) 325 ITR 288 (Chattisgarh)(HC)
CIT v. Aero Traders (P) Ltd (2010) 322 ITR 316 (Delhi)(HC)
In CIT v. Nalin P shah HUF www. Itatonline the court held that merely because claim of assessee was not sustainable in law penalty cannot be levied.

35. Prosecution

35.1. S.278E.Presumption as to culpable mental state.

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the Act charged as an offence in that prosecution.

Explanation.-In this sub-section, “culpable mental state” includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

In prosecution proceedings under Income tax Act burden is on assessee to prove that there exists a reasonable cause.

35.2. Compounding of offences

The assessee may approach for compounding the offence, under section 279(2).

36. Is it advisable for the assessee to move an application u/s 273A.

Yes, in an appropriate case.

S.279(IA). A person shall not be proceeded against for an offence under section 276C or section 277 in relation to the assessment for an assessment year in respect of which the penalty imposed or imposable on him under clause (iii) of sub section (1) of section 271 has been reduced or waived by an order under section 273A.

Once the commissioner waives even part of penalty, there cannot be prosecution. However, if waiver petition is rejected, only remedy is to file writ petition before the High Court. One may have to draft the petition in such a way that at least some portion of penalty is waived.

In **Asha Pal Gulati v. CBDT (2014) 361 ITR 73 (Delhi)(HC)**

Court held that language of section 273A(3) does not talk of one year, but one instance. Hence, for a number of years, one application can be made.

37. Advisable to approach Settlement commission under Chapter XIXB.

- As per section 245D(4), the final order is required to be passed within eighteen months from the end of month in which the application has been made. This ensures finality of assessment within in eighteen months
- Order of the settlement commission is final.
- The commission has power u/s 245H(1), to waive or reduce penalties imposable under the Income-tax Act. Generally, the Commission is very liberal in waiving penalties.
- The Commission has powers under section 245H(1) to grant immunity from prosecution

- Grants capitalisation of income offered.
- In most of the bogus purchases cases, GP has been accepted.
- This Finance Act 2014, extended the scope with effect from 1-10-2014. “Case” includes assessment, reassessment, revision under section 263, revision under section 264, and set aside order by Tribunal.

Therefore, in cases where reassessment is pending and appeal is set aside by the Tribunal, where order under section 263 setting aside the order, or under order set aside under section 264, one can approach the settlement Commission. This is a welcome provision. A number of assessees have approached the settlement commission where matters are admitted and final orders have been passed accepting the gross profit on the alleged bogus purchases.

38. Writ petition

One has to be very cautious before approaching the Court. However, in an appropriate case it may be advisable to file a writ petition to challenge reassessment, recovery, not furnishing the information, early hearing of appeal or where there is gross violation of national justice, etc.

40. Statement that the assessee stated that bogus bills are obtained and cash was withdrawn for getting various Govt contract. Can the assessee be penalised or prosecuted?

In India, the main law concerning bribery is a 1988 legislation called the Prevention of Corruption Act, 1988. According to this law, bribe taking by a public servant and bribe giving are equally wrong and, in the event of conviction, both are punishable by anywhere between 6 months to 5 years imprisonment and they shall also be liable to fine. For the most part, the act of giving and taking a bribe are treated at par under this law.

As section 12 of this Act states, —Whoever abets any offence [pertaining to bribery], whether or not that offence is committed in consequence of the abetment, shall be punishable with imprisonment for a term which shall be not less than 6 months but which may extend up to five years and shall also be liable to fine. It may be added here that the giving of a bribe is treated by lawyers as abetment to the crime of bribery, and so bribe giving is covered under this section.

Panalal v. State of Maharashtra, 1979 SC 1191- the bribe giver is in the position of accomplice and unless there is corroboration it is not safe to rely upon the evidence of the bribe giver. According to the learned counsel, giving bribe to a public servant is abetment punishable under Section 12 of PC Act and 109 of the IPC.

41. Right of Information Act.

When statements of parties or if assessee are not provided, the assessee can approach the Assessing Officer under the Right of Information Act. Assesseees can also ask details of statues of alleged bogus dealers from the Sales Tax authorities, and assessment status under the Income–tax Act.

42. Evidences on which AO may rely to prove the purchases are bogus.

Against the assessee:

41.1. Sree Rajvel & Co v.CIT (2004)268 ITR 267 (Ker)(HC)

Addition on account of bogus purchases was justified where assessee had failed to discharge onus to prove that purchases were genuine.

41.2. CIT v. La Medica (2001) 250 ITR 575 (Delhi)(HC)

Raw material was purchased by assessee. AO gave finding that seller was not in existence. Bank account was introduced by one of the sister concern of the assessee. The amount was withdrawn by the person who introduced the bank account. On facts the high Court reversed the order of Tribunal and confirmed the order of AO.

Editorial: This decision was distinguished in CIT v. Hilux Automotive (P) Ltd (2009) 23 DTR 385 (Delhi)(HC)

41.3. Sri Ganesh Rice Mills v CIT (2007) 294 ITR 316 (All)(HC)

Purchases were bogus. Manufacturer – Specific finding by the AO in order to lower down the profits, bogus purchases was introduced. Assessee being manufacturer, the deduction of purchases against sales was not allowable.

41.4. Indian Woollen Carpet Factory v. ITAT (2003) 260 ITR 658 (Raj.)(HC)

Burden is on assessee to prove the genuineness of purchases. Payments were not made. Court held that the assessee should furnish the latest address if they migrated to some other places. Addition was confirmed. Assessee has not discharged the burden. Addition was justified.

43. Following Check lists may help for better representation

1. Request the AO to give the copies of documents which he intends to use against the assessee.
2. Make an application for copies of statement of parties and assessee if the statement was taken in the course of survey etc.
3. If the notice is received U/s 148-
 - File return under protest
 - Ask for recorded reasons
 - Objections to reassessment
 - After receipt of the order rejecting the objection, consult the lawyer whether it is worth approaching High Court by way of writ or contests by filing an appeal etc.
4. File quantity details
5. Comparison of GP assessee's own case or similar trader or manufacturer
6. Ask cross examination of the alleged hawala dealer
7. Get the confirmation or affidavit from the broker
8. File detailed reply on facts
9. If statement was given on wrong presumption of law or facts–File retraction within reasonable time.
10. Before filing reply, see the implications under general law and other laws.
11. Make application under RTI to get the information of the alleged hawala supplier and details of his assessment under Sales Tax
12. File certificate from banks
13. Try to substantiate the claim before the lower authorities by facts and law
14. Try to produce all evidences before the AO/CIT (A) or Tribunal. Tribunal is the final fact finding authority. Only question of law can be challenged in the High Court. Hence, proper representation before ITAT is very important.

44. Precautions an assessee should take while dealing with new suppliers to avoid disallowance of claim for purchases.

It depends upon the nature of business and facts. One may consider the followings

- Deal with the parties who are genuine.
- Verify from website whether their names are registered or in the defaulters list
- Pay by account payee cheques
- Maintain the records as required by law
- Yea end outstanding balance is payable try to get the confirmation.
- If it is Pvt. Ltd. company make search in registrar of Companies
- If it is Firm register of firm to find out whether registered or not
- Get the confirmation from the broker
- One can have agreement with broker
- Know your customer
- Use of technology-Entire purchase delivery and production is recorded

Compiled by Mr Rahul Sarda, Advocate, KSA Legal Research Team.

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