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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA No. 2778/Mum/2022
(Assessment Year 2012-13)

DCIT, Central Circle-2(3) Room No.803, 8th Floor, Pratishtha Bhavan, M.K. Road, Churchgate, Mumbai-400 020 **(Appellant)**	Vs.	M/s Asian Star Company Ltd. 114-C, Mitta Court, Nariman Point, Mumbai-400 021 **(Respondent)**

PAN No. AAACA4856B

Assessee by	:	Shri Suchek Anchaliya, Ms. Vaishali More, ARs
Revenue by	:	Smt. Shailja Rai, CIT DR

Date of hearing:	28.02.2023
Date of pronouncement :	23.05.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by The Deputy Commissioner Of Income Tax, Central Circle 2 (3, Mumbai (The Learned AO) against the appellate order dated 1/8/2022 passed by the Commissioner Of Income Tax (Appeals) – 48, Mumbai (The Learned CIT – A) wherein the addition made by the learned assessing officer of ₹ 116,624,231/– on account of accommodation entries and consequent commission of ₹ 8,315,211 was deleted.

02. The learned assessing officer has raised following grounds of appeal: –

> *"1. Whether on the facts and circumstances of the case and in law, the learned CIT (A), has erred in deleting the disallowance of the suspected bogus purchases.*
>
> *2. Whether on the facts and circumstances of the case and in law, the Ld. CIT (A), has erred in not appreciating the reliance was placed on the charge sheet filed by the Enforcement Directorate regards to bogus purchases made by the assessee from various parties without supply of actual goods.*
>
> *3. Whether on the facts and circumstances of the case and in law, the Ld. CIT (A), has erred in deleting the disallowance of commission as alleged to bogus."*

03. Assessee is a company engaged in the business of trading, manufacturing, import and export of diamonds. It filed its return of income on 31/11/2012 declaring a total income of ₹ 378,440,970/–. Assessment under section 143 (3) of the act was made on 30/3/2016 determining total income of the assessee at ₹ 397,039,090.

04. Subsequently information was received From Investigation Directorate surat on 19/3/2019 that assessee company has made bogus payment of ₹ 10.32 crores to M/s R A Distributors private limited and M/S Ram Shyam exports private limited which are paper companies without having any business activities. These companies are engaged in providing accommodation entries or sending bogus foreign remittances to entities based in Hong Kong and UAE in guise of bogus import purchases. Further information was received from investigation directorate Mumbai that an action under section 133A of The Income Tax Act was carried out wherein it was found that assessee has debited expenses in the form of commission from four different parties. The enquiries were conducted and found that all the 4 companies have the same address and there are not available on the addresses mentioned in the income tax return and no business activity is being carried out from those premises. The statement of directors and shareholders were recorded who denied having any knowledge of business activities of these companies. The total commission expenditure incurred by the assessee company is amounting to ₹ 16,630,422/–.

05. Based on the above information, notice under section 148 of the income tax act was issued on 28/3/2019 after recording the reasons and obtaining approval from The Principal Commissioner of Income Tax –

central – 1, Mumbai. Accordingly, the reasons were recorded that (i) assessee has made non genuine payment of ₹ 10.32 crores and (ii) bogus commission payment of ₹ 16,630,422/– during the year under consideration and has not disclosed these fact in its return of income or during the assessment proceedings completed under section 143 (3) of the act and therefore the learned assessing officer has reason to believe that income of ₹ 119,830,422 chargeable to tax has escaped assessment for assessment year 2012 – 13 on account of the failure of the assessee to disclose full and true material facts necessary for assessment of its income for the assessment year under consideration.

06. In response to the notice under section 148, the assessee filed its return of income on 4/4/2019 declaring a total income of ₹ 378,440,970/–. Reasons recorded were communicated to the assessee on 10/4/2019. The notice under section 143 (2) was issued to the assessee on 29/8/2019. The assessee filed objection, which were also disposed of on 30/9/2019.

07. The learned assessing officer during the course of assessment proceedings issued a notice on 18/10/2019 to furnish the necessary details with respect to the transactions with RA distributors private limited and Ramshyam Exports private limited.

08. Assessee submitted its reply on 22/11/2019 stating that assessee does not have any transactions with Ramshyam exports private limited. The learned AO held that the assessee has entered into a transaction with level four entities and subsequently the money was transferred to Ram Shyam exports private limited. Thus, it was noted by the learned assessing officer that after the level of four – six layers, Ram Shyam exports private limited ultimately has received the money. Thereafter the learned AO asked the assessee to produce the Ledger account, the invoices and bank statement of all the intermediary companies up to level VI and 1 to 1 mapping of corresponding purchases and sales. Assessee submitted the same. However, the learned that assessing officer did not believe the explanation and noted that that assessee has transacted with entities at level four and six as in the fund trail by the investigation wing Surat. The funds have moved out to entities based in Hong Kong and UAE in the form of remittance received by these entities in the guise of payment for import of diamonds. The customs authorities have found that the bills of entries of bogus and there was no such import made by 12 companies which included Ram Shyam exports private limited. Therefore, the learned assessing officer held that ₹ 6.26 crores of purchases made by the assessee through intermediary companies of ram

Shyam exports private limited is bogus and nongenuine.

09. With respect to RA Distributors private limited assessee has purchased diamonds of ₹ 53,892,888. Assessee explained that this is in actual delivery of goods, which were subsequently sold on export. The assessee submitted the Ledger account, purchase invoices, bank statement, corresponding sale invoices and 1 to 1 mapping of goods purchased from this company and subsequently exported. The learned assessing officer was also shown that the transactions are in the ordinary course of business at arm's-length price with actual delivery of goods. Therefore, same are genuine. The learned AO issued later on 30/10/2019 to RA Distributors private limited under section 133 (6) of the act asking for certain information, the latter returned back with remark of postal authorities of "left". This was informed to the assessee's and assessee was directed to produce the party. Assessee on 16/12/2019 stated that the transaction with that party to place eight years back after that there is no transaction with the assessee and assessee is now not in touch with that party. Therefore, assessee is not in a position to give the reasons why the notice is un served. The learned AO rejected the contention of the assessee and stated that assessee has failed to produce the parties as well as the new address of that party therefore no independent verification could

have been done and hence the purchases are unproved. Mere filing of purchase invoices, bank statement showing purchase transaction and Ledger account are not conclusive evidence of genuine purchases accordingly he held that total purchases of ₹ 5.38 crores from this party is also bogus.

010. With respect to the commission expenditure of 4 parties which were not taxable at the addresses given in the return of income, assessee submitted that parties are genuine, they have been providing the services of mediation between the buyers and seller, facilitation in smooth transaction, assortment and evaluation of material and timely follow-up for procurement of material and its payment itself. The payments have been made through cheques, commission expenses were also in earlier years are accepted, the admission made by the directors of the company have been subsequently withdrawn. Assessee submitted the copy of Ledger account, copy of the bills invoices debit notes and also the bank statement to show the payment. The learned AO issued notices under section 133 (6) of the act to the various parties calling for information. In response to that notice one party submitted reply, however other three parties did not respond. Accordingly, the learned AO disallowed the payment of commission of ₹ 8,315,201/– to all the 4 parties.

011. Accordingly the assessment order under section 143 (3) read with section 147 of the act was passed on 30/12/2019 making the addition of ₹ 116,624,231 with respect to the purchase transaction and disallowance of commission expenditure of ₹ 8,315,211, determining the total income of the assessee at ₹ 521,978,532/–.

012. Assessee aggrieved with assessment order preferred appeal before the learned CIT – A, who passed a consolidated order on 1/8/2022 four assessment year 2012 – 13, 2014 – 15, 2017 – 18, 2018 – 19 and 2019 – 20. Though the issue in other assessment year from the impugned assessment year i.e. 2012 – 13. Assessee challenged the reopening of the assessment, the learned CIT – A dismissed this ground of appeal. Against the addition of ₹ 116,624,231 on account of bogus purchases, he held that assessee has purchased from nine exempt private limited, MD of show Distributors private limited and with the exempt private limited whether they can be termed as bogus entities whose name A. The fourth or sixth layer only based on said transaction flowing down, crossing 4 - 6 layers or more layers and ultimately lending to the account of Ram Shyam exports private limited company. He found that neither of these companies can be said to be bogus entities providing accommodation entry and not the payment to these three persons/companies will resume the colour of non-

genuineness only based on information of investigating wing Surat. He found that assessee has submitted the evidences in the form of Ledger accounts, purchase invoices, bank statements as well as 1 to 1 mapping of corresponding purchases and sales. The AO has acknowledged these evidences but has not rejected them. He further found that Nayan Exim private limited has sold Rs. 5.29 crores, out of which only 2.49 crores doubted by the AO, MD of show Distributors private limited has sold goods worth ₹ 6.97 crores out of which the AO has touched only Rs. 2.19 crores whereas in writ the exempt private limited assessee has purchased 7.40 crores out of which only ₹ 1.58 crores have been held to be bogus. He further held that that there is an allegation that there is a chain of companies alleged by the investigating authorities, however the assessing officer has not provided any evidences which established that these three entities are working in a coordinated fashion of issuing bogus bills in tandem with the other entities which are mentioned, there is no corroborative evidence to show that the entities from whom assessee has purchased material are bogus entities. He further referred to the charge sheet filed by the enforcement directorate on 18/7/2014 and stated that the names of these parties from whom assessee has purchased material did not find any mention. He further finds that the goods purchased from these parties have

been sold systematically and quantitative Delhi thereof is given in the tax audit report and quantity perfectly tallies with the books of accounts. Neither any adverse comment, nor any defect has been pointed out by the AO regarding the quantitative details on purchase or sales details. He further stated that the assessee maintained proper books of accounts including purchase register, since register, stock register, Ledger, daybook, bankbook et cetera and no defect or irregularity was found. He further held that as there is no finding of the assessing officer about the sales made by the appellant against the purchases the addition cannot be made. With respect to RA Distributors private limited, the learned CIT further held that with respect to the purchases the assessee has submitted the invoices, bank statement, sales and purchase register, account confirmation of the transactions, which have been entered into before eight years. According to him, the assessee has discharged his onus of proving the genuineness of the purchases. The goods purchased from this entity were also sold and quantity Delhi thereof is given in the tax audit report which is not been rejected by the learned assessing officer. Alternatively, he held that even if the purchases of ₹ 11.66 crores is found to be doubtful there is no scope for any addition in the instant case following the decision of honourable Bombay High Court Muhammad Haji Adam & co (ITA 1004 of 2016)

wherein it has been held that the purchases cannot be rejected without disturbing the sales in case of a trader and the additions limited to the extent of bringing the gross profit on purchases at the same rate of other genuine purchases could have only have been made. After that, he found that the gross profit of 6.81% from the above said purchases and the gross profit of the assessee from the audited books of account is 6.73% and the gross profit related to bogus purchases exceeds the gross profit from genuine purchases there is no scope of making further addition. Accordingly, the addition was deleted.

013. With respect to the commission expenditure disallowed of ₹ 8,315,211, the learned CIT – A though notices under section 133 (6) of the act were issued to the four parties but only one party furnish the reply and no information was received from the other three parties, but the assessee has submitted the debit notes, details of tax deducted at source, bank statements and financial statements along with the income tax return of those parties. With respect to the statement of the directors, he held that the statement was recorded under section 132 of the act in earlier research in case of the appellant in the year 2010 and assessment was completed under section 153A of the act wherein all the transaction of the appellant which above-mentioned four companies were held to be genuine. He further noted that in all

cases of recipient of the commission, the revenue/assessing officer observed that the commission expenses paid by this concerned were disallowed, commission income received by this concerned from the appellant during the year under consideration are accepted under the same head of income by the same assessing officer. He further produced a chart at paragraph number 10.4.5 of his order showing that the commission income shown in the audited account of these four entities who received the commission are offered. In the scrutiny assessment of all these four recipient who received the commission, the commission income has been accepted. The learned CIT – A further noted that even the proceedings initiated under section 24 of the prohibition of Benami property transaction act 1988 initiated against the recipient of the commission also held that these entities are not bogus. Accordingly he deleted the addition of Rs. 83,15,211/–.

014. Aggrieved with the order of the learned CIT – A the learned assessing officer is in appeal. The only ground is taken by the learned assessing officer is deletion of disallowance of bogus purchases and commission. The learned departmental representative referred to the assessment order with respect to the addition of bogus purchases it was submitted that assessee has failed to produce the party and therefore the addition is made with respect

to RA distributors private limited. She further referred to the statement submitted by the assessee showing 1 –to 1 mapping and stated that the purchases are shown in carrats but not in quantity. Therefore, the statement does not have any validity. It was further stated that assessee could not show any proof of delivery. It was further stated that purchase invoices does not have any direction. It was further the claim that there is no identification of the material purchased are sold. Accordingly, the argument of mapping of purchases with the sale is incorrect. It was further claimed that the learned and CIT – A has merely accepted the submission of the assessee and did not carry out any information from the assessee with respect to correlation of purchases with sales. It was further stated that when diamonds are traded there are no document shown with respect to insurance, assortment et cetera packets, transportation details and therefore it is merely a general statement, which does not show any core relation between purchases and sales. With respect to the decision of the honourable Bombay High Court it was submitted that that decision does not help the case of the assessee. Further, the gross profit rate taken by the learned CIT – A is also not correct, as there is no basis for taking gross profit rate of unaccounted purchases.

015. With respect to the commission expenditure, it was submitted that learned assessing officer has clearly

doubted the rendition of services by the parties to whom the commission have been paid. The order of the benefit and does not show how the services have been rendered. The particulars of the services are mentioned are very general and therefore the learned and CIT – A has deleted the addition without proper verification. She further relied on the decision of honourable Gujarat High Court in case of Gujarat insecticides 40 Taxman 166. She further relied on the decision of honourable Calcutta High Court in case of CIT versus Swati Bajaj 446 ITR 56 and specifically referred to paragraph number 65 to 69.

016. The learned authorized representative referred to the order passed by the learned CIT – A and submitted that the one-to-one mapping of purchases are shown at page number 123 – 124 of the paper book he submitted that the purchases from RA distributors private limited and also purchases from Nayan exempt private limited, read the exempt private limited and MB offshore private limited with respect to the sale. He submitted that the learned CIT – A has deleted the addition on the merit and on the alternative ground of cross profit. With respect to mapping of the purchases with sale, he referred that the purchases are made in the month of February whereas the sales are also shown by way of an export in the month of March. It was the claim that the purchases have gone into the sale is undisputed and the learned assessing officer has also not

questioned the same. This fact has been recorded by the learned CIT appeal. Even otherwise he submitted that the issue is squarely covered by the decision of the honourable Bombay High Court quoted by the learned CIT – A. It was further submitted that the decision of the honourable Calcutta High Court relied upon by the learned departmental representative related to the penny stock companies but same does not apply in the case of the assessee. It was stated that the decision of the honourable Gujarat High Court relied upon by the learned departmental representative is distinguishable on the fact and in that decision there was nothing to suggest that the recipient of such commission payment has rendered any services to the assessee and the onus was on the assessee claiming such deduction to establish that such payments were made for services rendered. It was submitted that it is not only the order of the Benami transaction act but also the order in case of the parties were rendered the services in whose hands the commission income has already been taxed was relied upon by the learned CIT – A. When the income is taxed in the hands of the parties who have rendered the services to the assessee and those parties were also assessed by the same assessing officer, the revenue now cannot contest that the income though offered in the hands of the recipient of the commission as commission income which they have earned on rendition of the

services, but the same assessing officer when assessing the case of the assessee who paid the commission says that there is no proof of rendition of the services is not acceptable.

017. On the query by the bench, the assessee submitted the details of the process of the purchases as well as the gross profit working of the assessee. It was submitted that the gross profit margin of the trading segment of the bogus purchases was computed by the learned CIT – A at 6.81% whereas the cross profit margin of the other genuine purchase transaction and its corresponding sale is 5.55% assessee submitted the carrot wise quantitative details of the alleged bogus purchases and the other purchases not disputed. He further showed the invoices of the other parties which are accepted by the learned assessing officer and the invoices of the alleged bogus parties where the description is similar, therefore, he submitted that it is not the practice to mention the number of diamonds involved in the purchases but it is only sold in carrats.

018. It was also the claim of the learned authorized representative that in case of the parties, which are alleged to be bogus, the learned assessing Officer has accepted the purchases from the same parties partly. Accordingly his claim was that it is not the only one reason by which the learned CIT – A is deleted the addition but he has applied several test

for allowing the claim of the purchases as genuine. In view of this it was his submission that the order of the learned CIT – A deserves to be upheld.

019. We have carefully considered the rival contention and perused the orders of the lower authorities. Merely there are two editions contested by the revenue. 1 addition on account of bogus purchases of ₹ 11.66 crores on account of accommodation entries, 2 addition on account of commission expenditure of ₹ 8,315,211/–.

020. The learned CIT – A has decided issue of bogus purchases as under:-

"7.2 It is observed that the AO has made the impugned addition after receiving information from Investigation Wing, Surat in the following manner-

2. In connection with the caption subject, it is to clarify that the 12 Indian Companies are ultimate beneficiaries (mentioned as T2.1 to T2.12 in the report) in the case of Afroz Mohamed Hasanfatta, from where remitted to foreign bank accounts. The Custom Authorities found on verification that the bills of entries were bogus and there was no such import made by these 12 companies related with Afroz Mohamed Hasanfatta as mentioned in the bill of entry. On receipt of the confirmation of bogus import, the Enforcement Directorate conducted investigation and filed a charge sheet against some persons on 18.07.2014 related with Afroz Mohamed Hasanfatta. On verification in the case of 12 companies related with Afroz Mohamed Hasanfatta, it appears that the account of the foreign based entities, wherein funds were funded in guise of import payment from Indian based entities. These companies are proved to be bogus and have disguised fund transferred in form of bogus purchases or bogus loan transactions. The identification of source of fund received by the said 12 entities are mentioned in the interim report forwarded by this office.

1. *The fund trail was undertaken from the starting point of the bank account of above 12 parties and traced back to the source of deposits entities. The activity for tracing the potential source resulted in analysis from Level 2 to Level 9 which were mentioned in the report forwarded along with its annexure to the jurisdictional AO. Segregation of fund received in the bank account of above mentioned 12 entities/parties was according to beneficiary name/depositor name.*

2. *As mentioned in the report, transaction mentioned at Level 1 are foreign outward remittances made by the 12 companies/entities related with Afroz Mohamed Hasanfatta from their bank accounts. The transactions mentioned at Level 2 are funds received by these 12 entities from various Indian Entities. Transactions mentioned at Level 3 are fund received by the entities mentioned at Level 2. Similar downwards transactions are mentioned in subsequent level. 3. So far as transactions related with M/s. Asian Star Company. Ltd. is concerned, the following amount is shown to have been received by a company out of the 12 entities as mentioned in the report:*

Number as mentioned in the report	*Name of the Entity*	*Name of the Beneficiary Party*	*Date of Transaction*	*Amount (Rs.)*
54	*M/s Asian Star Company Ltd.*	*M/s Ram Shyam Exports Pvt. Ltd.*	*29.02.2012*	*2.49 Cr*

54	M/s Asian Star Company	M/s Ram Shyam Exports Pvt. Ltd.	29.02.2012	2.19 Cr
54	M/s Asian Star Company	M/s Ram Shyam Exports Pvt. Ltd.	29.02.2012	1.58 Cr

1. *M/s. Asian Star Company. Ltd. had transactions with Level 4 entities namely M/s. Nayan Exim Pvt. Ltd. Subsequently, M/s. Nayan Exim Pvt. Ltd, has transferred funds to the above-mentioned company Le. M/s Ram Shyam Exports Pvt. Ltd. On perusal of the report furnished by the agency involved in the analysis of the fund trail, it is found that the transaction between M/s. Asian Star Company Ltd. & M/s. Nayan Exim Pvt. Ltd. had taken place on 29.02.2012 and M/s. Asian Star Company Ltd. transferred the amount mentioned above in the table to the A/c. No. 910020006124302 (this is the A/c of Nayan Exim Pvt. Ltd.) which was subsequently transferred to M/s. Ram Shyam Exports Pvt. Ltd. as described in Para 3 & Para 4 of this letter.*

1. *M/s. Asian Star Company Ltd. had transactions with Level 6 entities namely M.B. Offshore Distributors Pvt. Ltd. Subsequently, M/s. M.B. Offshore Distributors Pvt. Ltd. has transferred funds to the above-mentioned company Le. M/s Ram Shyam Exports Pvt. Ltd. On perusal of the report furnished by the agency involved in the analysis of the fund trail, it is found that the transaction between M/s. Asian Star Company Ltd. & M.B. Offshore Distributors Pvt. Ltd. had taken place on 29.02.2012 and M/s Asian Star Company Ltd. transferred the amount mentioned above in the table to the A/c No. 910020011061761 (this is the A/c of M/s. M.B. Offshore Distributors Pvt. Ltd.) which was subsequently transferred to M/s. Ram Shyam Exports Pvt. Ltd, as described in Para 3 & Para 4 of this letter.*

1. *M/s. Asian Star Company Ltd. had transactions with Level 6 entities namely M/s. Riddhi Exim Pvt. Ltd. Subsequently, M/s. Riddhi Exim Pvt. Ltd has transferred funds to the above-mentioned company Le. M/s Ram Shyam Exports Pvt. Ltd. On perusal of the report furnished by the agency involved in the analysis of the*

fund trail, it is found that the transaction between M/s. Asian Star Company Ltd. & M/s. Riddhi Exim Pvt. Ltd. had taken place on 29.02.2012 and M/s. Asian Star Company Ltd. transferred the amount mentioned above in the table to the A/c. No. 910020011100833 (this is the A/c of Riddhi Edm Pvt. Ltd.) which was subsequently transferred to M/s. Ram Shyam Exports Pvt. Ltd, as described in Para 3 & Para 4 of this letter.

7.3 Thus the genesis of information was the bogus foreign outward remittances made by the 12 companies/entities related to Afroz Mohamed Hasanfatta from their bank accounts. These 12 companies have been termed, as Level 1 entities. On further verification, it was found that the appellant, M/s. Asian Star Company. Ltd. had transactions with

(i) Level 4 entities Le., M/s. Nayan Exim Pvt. Ltd. on 29.02.2012 for an amount of Rs. 2.49 Cr. It is further mentioned in the order that subsequently, M/s. Nayan Exim Pvt. Ltd, had transferred funds to M/s Ram Shyam Exports Pvt. Ltd. through different layers.

(ii) Level 6 entity Le., M/s M.B. Offshore Distributors Pvt. Ltd. on 29.02.2012 for an amount of Rs. 2.19 Cr. It is also mentioned in the order that subsequently, M/s. M.B. Offshore Distributors Pvt. Ltd. has transferred funds to M/s Ram Shyam Exports Pvt. Ltd. through different layers.

(iii) Another Level 6 entity i.e., M/s. Riddhi Exim Pvt. Ltd. on 29.02.2012 for an amount of Rs. 1.58 Cr. It is also mentioned in the order that subsequently, M/s. Riddhi Exim Pvt. Ltd has transferred funds to M/s Ram Shyam Exports Pvt. Ltd. through different layers.

7.4 Reasons for concluding that the appellant has made bogus purchases from M/s. Nayan Exim Pvt. Ltd., M/s M.B. Offshore Distributors Pvt. Ltd. and M/s. Riddhi Exim Pvt. Ltd. are given in para 5.7 of the assessment order. The AO has stated that-

(i) It is clear that the assessee has transacted with entities at level 4 & 6

(ii) Funds have moved out to entities based in Hongkong and UAE in the form of remittances received by these entities in the guise of payment for import of diamonds.

(iii) The assessee has also dealt with the same commodity with the entities at level 4 & 6.

(iv) The customs Authorities have found on verification that the bills of entries are bogus and there was no such import made by 12 companies related with Afroz Mohamed Hasanfatta (which include Ram Shyam Exports).

(v) These companies have been proved to be bogus during the course of investigation and when percolated downwards through the layers, it also becomes clear that the layering entities at level 4 & 6 also indulge in providing accommodation entries as the ultimate destination of these moneys/remittances is to entities based in Hongkong and UAE in the guise of bogus imports.

7.5 At the same time, I find that the AO has acknowledged that the appellant has submitted

1. Ledger account, invoices and bank statement of M/s Nayan Exim Pvt Ltd, M/s M B Offshore Distributors Pvt Ltd and M/s Riddhi Exim Pvt Ltd.

2. One to one mapping of corresponding purchases and sales.

7.6 In my considered view, the only issue to be decided here is whether M/s Nayan Exim Pvt Ltd, M/s M B Offshore Distributors Pvt Ltd and M/s Riddhi Exim Pvt Ltd. can be termed as bogus entities whose names appear at the 4 or 6 layer only on the basis of said transactions (related to the appellant of Rs. 2.49 crore, Rs. 2.19 Crore and Rs. 1.58 Crore) flowing downwards, crossing 4 or 6 more layers and ultimately landing to the accounts of M/s. Ram Shyam Exports Pvt. Ltd., a company connected with Afroz Mohamed Hasanfatta? This issue is further analysed in the light of evidences on record, surrounding circumstances and the judicial precedence.

7.7 Upon further analysis I find that, neither M/s Nayan Exim Pvt Ltd, M/s MB Offshore Distributors Pvt Ltd and M/s Riddhi Exim Pvt Ltd. can be considered as bogus entities providing accommodation entries nor the said payments

made by the appellant of Rs. 2.49 crore, Rs. 2.19 Crore and Rs. 1.58 Crore to these three concerns will assume the colour of non-genuineness solely on the basis of information of Investigation Wing, Surat. The reasons are as under-

7.7.1 Evidences submitted being disregarded. The evidences that the appellant submitted during the assessment as well as appellate proceedings are-

1. Ledger accounts of the transactions with the purchase parties

2. Purchase invoices

3. Bank Statements of the appellant highlighting the payment to M/s Nayan Exim Pvt Ltd, M/s M B Offshore Distributors Pvt Ltd and M/s Riddhi Exim Pvt Ltd. and

4. One to one mapping of corresponding purchases and sales.

7.7.1.1 Although the AO has acknowledged receipt of these evidences, he has not commented on the merit of these as seen from para 5.7 of the order. He has neither highlighted lacuna in these evidences nor rejected it. His complete silence on the documentary evidence while accepting only the information received from Investigation Wing, Surat is one sided will not give credence to his conclusion.

7.7.2 A no. of Transactions - The Ld. AR, during the appellate proceedings, has also highlighted that the appellant had entered into several other transactions of purchase of goods (cut and polished diamonds), at arm's length price, with M/s Nayan Exim Pvt Ltd, M/s M B Offshore Distributors Pvt Ltd and M/s Riddhi Exim Pvt Ltd. throughout the year, which is in the ordinary course of business of the appellant. It is also submitted that the appellant had regularly made payments for purchases throughout the year and transferred various sums of money to these purchase parties via banking channels. According to the Ld. AR, other than payments for purchases of cut and polished diamonds, the appellant had not transferred any other sum of money to the three concerns.

7.7.2.1 From the ledger accounts of the 3 concerns (available at page no. 132, 138 & 145 of the paper book submitted during the appellate proceedings), following facts emerge-

Name of the Concern	*Total Purchases during FY 2011-12*	*Purchases doubted by the AO*
M/s Nayam Exim Pvt. Ltd.	*₹ 5,29,25,831/-*	*₹ 2.49 Cr*
M/s M B Offshore Distributors Pvt Ltd	*₹6,97,32,762/-*	*₹ 2.19 Cr*
M/s Riddhi Exim Pvt. Ltd.	*₹ 7,40,81,413/-*	*₹ 1.58 Cr*

7.7.2.2 In my considered view, a concern will be non-genuine or bogus in entirety and not partially. As is evident from above, the appellant has purchased 2x to 5x from these concerns than the purchases for which information was received and disallowances were made. What about the balance purchases? The AO has not touched upon it. Once the AO has accepted the balance purchases as genuine, only conclusion that can be drawn is that in the opinion of the AO goods were actually received from these entities. In such circumstances, there is no reason to consider these concerns as non-genuine, paper entity or bogus.

7.7.3 No Connection established. If the purchases treated as bogus, from these entities are further examined, I find that while M/s. Nayan Exim Pvt. Ltd. is a level 4 entity, M/s M B Offshore Distributors Pvt Ltd and M/s Riddhi Exim Pvt Ltd. are level 6 entities. Initial trigger entity (Level 1 entity) was M/s. Ram Shyam Exports Pvt. Ltd., which was investigated by the Custom Authorities. As per the information received, the Custom Authorities found that the bills of entries were bogus and there was no such import made by the companies related with Afroz Mohamed Hasanfatta. M/s. Ram Shyam Exports Pvt. Ltd. was one of such companies. The AO has stated that on receipt of the information of bogus import, the Enforcement Directorate (ED) conducted investigation and filed a charge sheet against some persons on 18.07.2014 related with Afroz Mohamed Hasanfatta.

7.7.3.1 If that is the case, whether all the entities which form the trail, from level 2 onwards to level 6, 7 or to the nth no. will automatically become bogus or non-genuine without bringing further material on record. In my considered view, it is the duty of the AO to establish that all the entities in the trail are working in a syndicate manner, in harmony, in promotion of the nefarious activities on Afroz Mohamad Hasanfatta. Moreover, it is also the duty of the AO to provide such evidences, which establish that the three entities are working in a co-ordinated fashion, of issuing bogus bills, in tandem with the entities of Afroz Mohamed Hasanfatta, to the appellant for rebuttal. Nothing has been brought on record which suggests existence of such evidences specific to M/s Nayan Exim Pvt Ltd, M/s M B Offshore Distributors Pvt Ltd and M/s Riddhi Exim Pvt Ltd. and purported transactions either in the assessment order or the Investigation Wing, Surat Report. The AO has also not brought on record that even in the charge sheet filed by the Enforcement Directorate (ED) on 18.07.2014, the names of three concerns exist or what are the findings of the ED.

7.7.3.2 On the other hand, the Ld. AR has vehemently stated that there is no allegation that the appellant has received back any cash/fund against the transfer of purchase consideration which was made through banking channels from the three parties. For this purpose, reliance has been placed in the case of CIT vs. M.K. Bros. (1987) 163 ITR 249 (Guj.) wherein it is held that the "nothing indicate that any part of the fund given by the appellant to these parties came back to the appellant in any form and the payment was made by cross account payee cheque so the evidence is not adequate to conclude that transaction is bogus".

7.7.3.3 The Ld. AR has further stated that the goods purchased from the purchase parties have been sold systematically and quantitative tally thereof is given in the tax audit report u/s 44AB of the Act and the quantity perfectly tallies with books of accounts. Further, during the course of assessment proceedings, the appellant had submitted one to one mapping of corresponding purchases and sales. Neither any adverse comment nor defect has been pointed out by the A.O. regarding the quantitative details and purchase-sales details provided. The appellant maintains proper books of accounts

including purchase register, sales register, stock register, ledger, day book, bank book etc and no specific defect or irregularity was found or observed by the auditors. The A.O. has also not rejected the sales of the appellant.

7.7.3.4 I find merit in the above arguments of the appellant. The A.O. has not doubted the sales made by the appellant against the purchases (which are disallowed in the assessment order) but at the same time, disallowed the payments made for such purchases. The AO's action is solely based on the information received from Investigation Wing. Surat. As stated above, the Information does not reveal direct connection of these three parties with the concerns controlled by Mohammed Afroze Hassan Fatta and as to how the payments made by the appellant have turned into hawala transaction. On the other hand, the appellant has submitted overwhelming evidences which have not been contradicted by the AO.

7.7.8 Reg. M/s R.A. Distributors Pvt Ltd- With respect to M/S RA. Distributors Pvt Ltd., although facts are identical as that of the 3 parties mentioned above, the AO had issued notice u/s 133(6) of the Act, dated 30.10.2019, which was returned unserved by the postal authorities. In this regard, the appellant submitted before the AO that the transactions of purchase of stock with the said concern were only during the year under consideration, i.e., almost 8 years ago and after that there has been no transaction with the said party. As per the reply of the AO, there could be various reasons for which the notice could be unserved, such as change of address, closure of business, financial losses, Government litigation, Death/ insolvency/ Unsound mind of key management and so on. Before the AO, the appellant submitted various documentary evidences to support genuineness of the transaction. It is further submitted that mainly because the notice remained unserved that doesn't lead to the conclusion that the transaction was not genuine overlooking other vital documents submitted to prove the genuineness of transaction.

7.7.8.1 During the course of appellate proceedings, the Ld. AR has further submitted that the appellant has filed the details relating to purchases from M/s R.A. Distributors Pvt Ltd viz., invoices, bank statement, sale and purchase register, account confirmation of the purchase parties etc.

According to him, the appellant has established the genuineness of transactions and there remains nothing on the part of the appellant, which has not fulfilled. The appellant has discharged the entire obligation to establish genuineness of transaction. For M/s R.A. Distributors Pvt Ltd. too, the goods purchased from it were sold and quantitative tally thereof is given in the tax audit report u/s 44AB of the Act. The A.O. has not rejected the sales of the appellant out of the purchases made from M/s R.A. Distributors Pvt Ltd.

7.7.8.2 I find that in the case of M/s R.A. Distributors Pvt Ltd. too, the situation is identical as that of the three other concerns which are discussed in the preceding paragraphs. The appellant has submitted numerous evidences to establish genuineness of purchases. The purchase quantity tallies with the books of accounts. Moreover, the appellant has also provided one to one mapping chart of the purchases from M/s R.A. Distributors Pvt Ltd. and their corresponding sales. There is no adverse comment and no defect has been pointed out by the A.O. regarding the quantitative details and purchase-sales details provided by the appellant. The sales figure has not been disturbed. However, the A.O. has completely disregarded these evidences and resorted to disallowance of entire purchases from M/s R.A. Distributors Pvt Ltd. The action of the A.O. cannot be justified.

7.9 Considering the totality of facts and circumstances of the issue involved and evidences on record, in my considered view, the addition of Rs. 11,66,24,231/- (Rs. 6,27,31,343/- from M/s Nayan Exim Private Limited, M/s M.B. Offshore Distributors Private Limited, & M/s Riddhi Exim Private Limited and Rs.5,38,92,888/- from M/s R.A. Distributors Private Limited.) deserved to be deleted.

8.0 Alternatively even if, it is considered that the purchases of Rs. 11,66,24,231/-, as identified by the AO, are doubtful, still there is no scope for any addition in the instant case as per the ratio laid down by Hon'ble Bombay High Court in case of PCIT vs. M/s Mohommad Haji Adam & Co. [ITA NO. 1004 OF 2016 (Bombay High Court)! wherein it is held that:

"8. In the present case, as noted above, the assessee was a trader of fabrics. The A. O. found three entities who were

indulging in bogus billing activities. A. O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by- the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases,"

8.1 According to the Hon'ble Jurisdictional High Court, the additions will be restricted to the extent of bringing the G.P. rate on doubtful purchases at the same rate of other genuine purchases, where finding of the facts being accepted is that the entities have indulge in bogus billing activities and the purchases made by the assessee from such entities are found to be bogus. Even from this view point too, I find that the GP, with respect to the non-genuine purchases, are comparable to GP as shown in the Audited books of accounts of the present appellant.

8.2 In the paper book page no. 153, one to one mapping of the each lot of purchase & corresponding sales, quantitively & value wise, with respect to the four entities are tabulated. The GP from the same works out to be

Name of the Concerns	*Purchases Doubted by the AO (in Rs.)*	*Corresponding Sales (in Rs)*	*Gross Profit (Rs)*
R.A. Distributors Pvt. Ltd.	*5,38,92,888/-*	*5,79,65,512/-*	*40,72,624/-*
Nayan Exim Private Limited, M.B. Offshore Distributors Pvt. Ltd. & Riddhi Exim Pvt. Ltd.	*6,27,31,343/-*	*6,71,80,653/-*	*44,49,310/-*
Total	*11,66,24,231/-*	*12,51,46,265*	*85,21,934 (6.81 %)*

Thus, Against GP of 6.81% from the above said purchases, the GP as per the audited books of accounts is 6.73% [Rs. 102,92,33,000/Rs. 15,29,08,86,000/- (turnover of FY 2011-12) Page no. 42 of the Paper book]. Once the G.P. related to bogus purchase exceeds the G.P. from genuine purchase, there remains no scope for any disallowance, if the sales figures are not disturbed.

9.0 Respectfully following the above binding decision of the Hon'ble Jurisdictional High Court and discussion made in the preceding paragraphs, the AO is directed to delete the addition of Rs. 11,66,24,231/ made on account of abovesaid purchases made from M/s Nayan Exim Private Limited, M/s M.B. Offshore Distributors Private Limited, M/s Riddhi Exim Private Limited and M/s R.A. Distributors Private Limited. Thus, ground of appeal no. 3 is Allowed."

021. The learned CIT – A has categorically noted that assessee has submitted the evidences with respect to the Ledger accounts of the transactions with purchase parties, purchase invoices and bank statements of the appellant showing the payment made to the parties. Assessee has also shown the mapping of corresponding purchases and sales. The argument of the learned DR is that one-to-one mapping shown by the assessee is not correct for the reason that in the purchase bills of these parties there is no narration with respect to the quantity i.e. number of diamonds as well as the colour et cetera. To support the same, the learned authorized representative has submitted the other beans of the other parties, which have been accepted by the learned assessing officer as genuine purchases. On

perusal of those bills, also there is no mention of number of diamonds as well as the colour of the diamonds. Therefore, it cannot be said that in the purchase bills the assessee should have mentioned this details as that is not the trade practice and that is also not the reason why the learned assessing officer has rejected those purchases.

022. With respect to one-to-one mapping therefore only criteria is the sale of carats of the diamond. Assessee has shown that number of carats purchased from the three entities is 585.88 carats and the sale of the diamond is also 585.88 carats. The amount of purchases recorded his 6.27 crores whereas the sale of the same diamond is shown at 6.71 crores. With respect to purchases from RA Distributors private limited, the assessee has purchased 496.88 carats and identical carats were sold. The purchase price of these diamonds is ₹ 5.39 crores and the sale is ₹ 5.79 crores. With respect to the purchases from three different entities the learned CIT – A has noted that assessee has purchased from these parties ₹ 5.29 crores, 6.97 crores and ₹ 7.40 crores out of which the learned assessing officer has doubted only Rs 2.49 crore, 2.19 crores and ₹ 1.58 crores. The total purchases affected by the parties are also having identical billing narration. Thus, according to us the learned CIT – A has correctly decided that there is a one-to-one mapping available from purchases which are considered as alleged bogus

purchases by the AO and corresponding sales. Further, it has been held that there is no connection established by the learned assessing officer with respect to purchases from these three parties by the assessee with the alleged bogus purchases recorded in the investigation wing information as well as the charge sheet filed by the enforcement directorate. The learned assessing officer has also not challenged that assessee has not maintain proper books of accounts including purchase and register, since register, stock register and day-to-day bank book. No specific defect or irregularity was recorded by the AO. With respect to the gross profit computed by the assessee from bogus sales is based on the number of carats purchased by the assessee and the same number of carats sold by the assessee. With respect to purchases from three different entities, the learned CIT – A has computed gross profit of ₹ 44.49 Lacs and purchases from our A Distributors private limited gross profit is computed at ₹ 40.72 lakhs. Thus, the average gross profit earned by the assessee on total purchases of ₹ 11.66 crores; assessee has earned gross profit of ₹ 85.21 lakhs, which is 6.81%. Gross profit as per the regular books of account is 6.73%. Thus, no infirmity can be found in the finding of the learned CIT – A whereas assessee has shown higher gross profit from alleged bogus purchases compared to its regular transaction. The honourable Bombay High Court in 103

taxmann.com 459 has dealt with identical issue in case of Mohammad Haji Adam & co [Supra] as under:-

> **"8.** In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT (A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of *N.K. Industries Ltd*. (*supra*) cannot he applied without reference to the facts. In fact in paragraph 8 of the same Judgment the Court held and observed as under—
>
> " So far as the question regarding addition of Rs. 3,70,78,125/- as gross profit on sales of Rs. 37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6% gross profit is taken into

account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly, as a result of which profit comes to 5.66%. Therefore, considering 5.66% of Rs. 3,70,78,125/- which comes to Rs. 20,98,621.88 we think it fit to direct the revenue to add Rs. 20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue."

9. In these circumstances, no question of law, therefore, arises. All Income Tax Appeals are dismissed, accordingly. No order as to costs."

023. Further, honourable Bombay High Court in case of Sundram gems Private Limited ITA number 6785 of 2010 has categorically held that in case of Diamond trade, carrat wise stock maintenance would be the sufficient compliance; therefore, the assessee cannot be further burdened to show the colour and number of diamonds. When bills of purchases from other parties and from the same parties where part of the purchase consideration is accepted as genuine, no such details are available in the sale bill, we do not find any reason to deviate from the finding of the learned CIT – A.

024. In view of the above facts, we find that the learned CIT – A has correctly considered that the purchases from these parties is genuine when part of purchases from the same parties is not disputed, even otherwise, even if it is held that the purchases from

these parties are bogus, then also, the proper course would be to determine the profit arising from the purchases by looking at corresponding sales and what amount of gross profit is earned on alleged bogus purchases. If the alleged bogus purchases show gross profit higher than the regular gross profit shown by the assessee, no further addition is required to be made in the hands of the assessee. The logic behind this is that sale is already accounted for on the credit side of the profit and loss account. If the purchases are to be removed, the corresponding sale is also required to be removed from the profit and loss account, sales is higher than the purchases in rupees terms, therefore, the addition would be only required to be made to the extent of lower gross profit on alleged bogus purchases then the regular gross profit. This also takes the care of the argument that no proof of delivery of goods purchased are shown by the assessee, similarly, the sales are also bogus. It is not the case of the AO that amount invested in acquiring the bogus purchases should also be considered as an addition, because the only addition is disallowance of bogus purchases, no further addition is warranted. The order of the learned CIT – A follows the decision of honourable jurisdictional High Court which binds him as well as us. In view of this, ground number 1 and 2 of the appeal of the AO are dismissed.

025. Ground number 3 is with respect to disallowance of commission expenditure. With respect to the addition of commission expenditure, the learned CIT – A has dealt with this issue as under:-

"Decision on Ground No. 4, 6 and 7

10.2 I have carefully considered the above submission of the appellant in the light of findings in the assessment order. The AO has made the impugned addition as he found that the four concerns have not carried out any genuine business but are solely used for accommodation entries in the form of commission expenses. The AO has formed his opinion about the bogus nature of commission expenses on the basis of information received from the Investigation Directorate, Mumbai to the effect that the appellant had debited commission expenses to companies' viz., M/s Flora Impex, M/s Nishant Impex, M/s Rahil Impex and M/s Shloka Traders, which have same address. According to the AO these companies were not traceable at the addresses mentioned in the FTRS and no business activity was carried out from said premises. It is observed that though the appellant had submitted various documentary evidences in support of its claim, in the opinion of the AO, no evidence is submitted to establish the nature of services rendered by the above mentioned entities to which the impugned commission was paid. According to the AO, the payment through banking channel is not a conclusive proof of genuine transaction.

10.3 Notices u/s 133(6) of the Act were issued by the AO to the four parties in order to find their identity and genuineness of transaction. It is mentioned in the assessment order that only M/s Shloka Traders Pvt Ltd. furnished its reply vide letter dated 09.12.2019, while no response was received from M/s Flora Impex, M/s Nishant Impex and M/s Rahil Impex. Considering the above, the AO has drawn the following conclusion-

6.7 In view of the facts and in absence of any evidences/ submissions/ details from M/s Flora Impex Pvt. Ltd., M/s. Rahil Impex Pvt. Ltd. and M/s Nishant Impex Pvt. Ltd. the

information received from investigation are seems to be correct that the above companies are only the paper/shell companies and do not having any business activity is being carried out. Since the assessee fails to prove genuineness of the transactions, the commission expenses made to the following parties is need to be disallowed.

Sr	Name of Company	A.Y. 2012-13 (Amt.)
1.	Flora Impex Pvt. Ltd.	20,54,691/-
2.	Nishant Impex Pvt Ltd.	5,99,225/-
3.	Rahil Impex Pvt. Ltd.	24,70,750/-
4.	Shloka Traders Pvt. Ltd.	31,90,545/-
		83,15,211/-

In the instant Case, the total undisclosed commission which is required to be added is 83,15,211/-"

10.4 During the appellate proceeding, the Ld. AR has submitted various documentary evidences forming part of the paper book. It is also certified that these evidences and facts were also brought to the knowledge of the AO during the assessment proceedings. These evidences has been examined in the light of observations of the AO in the following paragraphs.

10.4.1 In the assessment order, the AO has given an observation that no evidence is submitted during the assessment proceedings to prove the nature of services rendered by the four entities to which commission to the extent of Rs. 83,15,211/- was paid. In this regard, the Ld. AR has stated that it was explained to the AO that the above concerns are regular brokers of the appellant who have facilitated procurement of export business for the appellant company over the years. These concerns have helped in the services of mediation between buyers and sellers, facilitation in smooth transaction, assortment and evaluation of material and timely follow up for procurement of material and their payment thereof, etc. It is further explained that the payment for commission/brokerage to these parties were made through Account Payee Cheques/Banking channel after duly deducting TDS. The appellant company had paid the commission for its genuine business activity.

10.4.2 In para 6.3 of the order, the AO has acknowledged receipt of following documentary evidences to substantiate the genuineness of commission paid to M/s Flora Impex, M/s Nishant Impex, M/s Rahil Impex and M/s Shloka Traders:

(i) Copy of Debit note showing working of commission.

(ii) Details of TDS deducted is shown in the statement of commission paid.

(iii) Copy of Bank Statement duly marked for commission paid.

(iv) Copy of Financial Statements and ITR Acknowledgement.

10.4.3 The Ld. AR has further stated that notices u/s 133(6) of the Act were issued to the four entities to verify the identity and genuineness of the transaction. Although in the assessment order, it is mentioned that only M/s Shloka Traders had replied to the said notice, but in reality all the four concerns i.e., M/s Flora Impex, M/s Nishant Impex, M/s Rahil Impex and M/s Shloka Traders had duly e-mailed their response against notice u/s 133(6) of the Act to the A.O. supplying copies of ledger confirmations reflecting the details of transaction with the appellant, copy of debit note showing the working of commission and copies of their ITRS. These evidences have again been submitted during the appellate proceedings. I find that the AO has not pointed out any lacuna in these evidences nor rejected it. In my considered view, without examining the merit of the evidences, one cannot simply reject it or ignore it. Any documentary evidence submitted during assessment proceedings has got some evidentiary value which needs to be commented upon by the AO.

10.4.4 In para 6.3 of the assessment order, the A.O. has made a reference to statements under oath recorded by directors regarding commission paid. In this regard, Ld. AR submitted that earlier a search action u/s 132 of the Act was carried out in the case of the appellant in the year 2010 and assessment was completed u/s 153A of the Act wherein all the transactions of the appellant with above mentioned four companies were held to be genuine.

10.4.5 It is further observed that all the four concerns Le, M/s Flora Impex, M/s Nishant Impex, M/s Rahil Impex and M/s Shloka Traders are also assessed by the same AO, whose scrutiny assessment u/s 143(3) rws 147 were simultaneously passed in the month of December, 2019. Appeals have been filed in these cases too with the undersigned. On verification of the scrutiny assessment orders of these four concerns, it is observed that while commission expenses paid by these concerns were disallowed, commission income received by these concerns from the appllant, during the year under consideration, are accepted under the same head of income, by the same AO. Total commission income shown and accepted for these concerns during AY 2012-13 as tabulated as under-

S	Name of the Companies (Brokers)	Commission Income Shown In the Audited A/c and accepted in the respective order of 4 Companies	Commission income disallowed in the order of M/s Asian Star co. for A.Y. 2012-13
1	Flora Impex Pvt. Ltd.	Rs 22,72,761/-	Rs 20,54,691/-
2	Nishant Impex Pvt. Ltd.	N.A.	Rs 05,99,25/-
3	Rahil Impex Pvt. Ltd.	Rs 26,19,996/-	Rs 24,70,750/-
4	Shloka Traders Pvt. Ltd.	Rs 31,67,985/-	Rs 31,90,545/-

In my considered view, if the AO, in the instant case has given a findings that the four concerns are just providing accommodation entries, bogus in nature and commission paid by the appellant is non-genuine, simultaneous effect should have been given while passing the scrutiny assessments in the four cases. Instead, receipt of commission in all four cases has not been disturbed as neither the books of accounts are rejected not the commission receipts have been categorised under "income from other sources". There is no adverse finding in the scrutiny assessment orders of the four brokers/ cominission agents passed in Dec., 2019 by the same AO, as far as receipt of commission income from the appellant is concerned.

10.4.6 Finally, the Ld. AR has also brought on record that the same information ie., information received from Investigation Directorate, Mumbai survey action conducted u/s 133A of the Act in the case of the appellant and related concerns, was also forwarded to the Initiating Officer (1.0.) as referred to in section 24 of the Prohibition of Benami Property Transactions Act, 1988 (PBPT Act'). The Initiating Officer issued provisional order u/s 24(4) of the PBPT Act on 8 alleged benamidars, including M/s Flora Impex, M/s Nishant Impex, M/s Rahil Impex and M/s Shloka Traders, and 1 alleged beneficial owner. Further reference u/s 24(5) of the PBPT Act was made to the Adjudicating Authority for adjudication of alleged benami property u/s 26 of the PBPT Act. The Ld. Adjudicating Authority (AA) under the Prohibition of Benami Properties Act, 1988, passed order u/s 26(3) of the PEPT Act, dated 11.10.2021 vide Order Number 24/AA/MUM/PBIT/2021-22, wherein it is held that there is no evidence against the alleged Benami concerns. The relevant portion of the said order of AA is reproduced as under.

"Discussions and Findings

8. I have carefully gone through the submissions, both written and oral, from both the sides including the facts recorded in the SCN, orders under section 24(3), 24 (4), reference u/s replies by the defendants and the rejoinders by the Initiating Officer, the documents in the RUDs etc. On perusal of these documents and submissions and after

considering the output of the lengthy discussion held during the hearing with the advocates of both the sides, following observations are made out.

8.1. The contention of the defending parties that the action taken by the Initiating Officer by issuing show cause notice u/s 24(1) and subsequent passing of orders u/s 24(3), 24(4), inter-alia, by making retrospective application of the provisions of the prohibition of The Benami Property Transactions Act, 1988 are illegal, bad in law and void ab-initio, was considered in detail. I find that various courts have taken different stand and done varying interpretation in this legal issue and the subject is now sub judice before the Hon'ble Apex Court. The decision of Single Judge of Hon'ble Rajasthan High Court is under challenge before the Hon'ble Division Bench of Rajasthan High Court and there are two interim orders passed by the Hon'ble Division Bench and thus, it would be in the interest of justice to not to rely upon said decision until and unless the final decision of Hon'ble DB of Rajasthan High Court is reached, Further, the Hon'ble Chhattisgarh high Court have decided that provisions of the PBPT Act are applicable to the properties pronged before 01.11.2016.The Hon'ble Supreme Court vide its order dated 03.02.2020 has granted stay on operation of order passed by the Hon'ble Calcutta High Court Dated 12.122019 in the case of Ganpati Dealcom (P) Ltd in respect of SLPC) No. 002784/2020 registered on 27.01.2020. In the sald order of Hon'ble Calcutta High Court, it is held that provisions of PBPT Act will not be applicable for the transactions done before 01, 11.2016. Further Hon'ble Apex Court while disposing Special Leave to Appeal No 10545/2020 has ruled on 24-09-2020 as under Mr Arunabh Chowdhury, learned counsel appearing on behalf of the petitioner points out the difference between the Calcutta High Court proceeding ill which we have issued notice and stay and the present proceeding in which the appeal is still pending before the Division Bench In view of the fact that the appeal is still pending the interim order that has been passed by the Division Bench on 15-10-2019 will continue to operate. There shall be stay to of the impugned order to that extent. Thus, this Authority has to refrain itself from commenting or passing any further order by interpreting to provisions of PBPT Act which is pending and subjudice before the Hon'ble Supreme Court. Needless to say, that in case the

final order which is being passed, shall always be subject to the decision of Hon'ble Supreme Court,

8.2. The defendants have further contented that the action taken by the Initiating Officer by issuing show cause notice u/s 24(1) and orders passed by it u/s 24(3), 24(4) and the reference made u/s 24(5) are all barred by Limitation as order was passed on the 918! day the date of SCN this regard, the Initiating Officer has placed reliance. On the Provisions of the Section 9 of the General Clauses Act 1897 and agree with him. The said provision says that in any Central Act or Regulation made after the commencement of this Act, it shall be sufficient for the purpose of excluding the first in series of days or any other period of time to use the word 'from and for the purpose of including the last series of days or any other period of time, to use the word 'to Thus the first day is the date of notice which should be excluded and the days should be counted starting from the next day, Thus this allegation is not maintainable.

8.3. Another contention of the defendants is that the Initiating Officer failed to establish any nexus in the transaction for purchase of the subject properly as benami when examined on the touchstone of the crucial test of a benami transaction. In this connection, I must say that the nexus and the extent thereof may vary from case to case depending on the facts and circumstances of the case, In this case the Initiating Officer defends this argument on the grounds that the purchase consideration was paid by the beneficial owner, the benamidars are being centrally controlled and monitor by the beneficial owner who has received benefits from the benamidar entities and the shareholders and directors of the said entities ale dummy name lenders. It must be noted that the nexus must be clearly visible in a case where the section 2(9)(A) is invoked. In the case in hand the Beneficiary owner and the eight benamidars are defined and are available, the centre point benami properties are not correctly identified, the description of the properties are not correct and not identifiable with the given description. In such a scenario the nexus of the beneficial owner to the properties through the benamidars is not found to be established. Further, the acid test for Benami Property is satisfaction as per the definition given in Section 2(8) which states that "any property which is the subject matter of a benami transaction and also includes

the proceedings of such property." Section 2(9) of the PBPT Act defines a Benami transaction to mean a transaction or an arrangement where a property is transferred to or is held by, a person, and the consideration for such property has been provided or paid by, another person; and the property is held for the immediate and future benefit, direct or indirect, of the person who has provided the consideration The thrust of the provision contained in section 2(9XA) is primarily on the twin aspects / dual limbs and both of which need to be established by the Initiating Officer beyond any doubt, The person holding title and the person providing the consideration for the purchase of property being different persons, and the person for whose benefits immediate or future, the said property is held is different from title holder are required to be established. It is seen from the bare perusal of the SCN u/s 24(1) and Attachment order u/s 24(3) and 24(4), the Initiating Officer is unsure and vague as he is twing to use all the available clauses of section 2(9), It has been inferred by the Initiating Officer that the consideration for the subject properties came from Shree Vipul P Shah his family members and his group concern. But no evidence, whatsoever, brought on record by him to show or establish from where and how did the consideration flow from the alleged sole beneficial Owner for all) of the investments made by the DI-D8 over the years starting 1995 to 2098. The best case as per the Initiating Officer is that the answering defendant lent funds of Rs. 1 crore each to two of the 'defendant companies in the year 2009. There is clear mismatch in the amounts invested and funded and timing of the investment. There cannot be any nexus between funds received in 2009 and used for investments made in 1995 to 2008. He has not even examined the flow of funds breach of the times the DI-D8 invested in the shares they held in it's DEMAT account. Therefore, the Initiating Officer has failed to prove with any cogent evidence that the subject properties had been acquired and the consideration amounts ever paid by the alleged beneficial owner. Again there is allegation that funds of family members of the alleged beneficial owner and the group company ASCL have been used by the benami companies, but no effort has been taken to include these family members and the ASCL as beneficial owners as each individual and the companies are separate legal entities and they cannot be clubbed with Shree Vipul Shah. Further, the only alleged link of Optionally

Debentures issued for the loans taken by DI -D4 have since matured without the conversion clause being ever invoked, The Initiating Officer has also not been able to show any instance of or demonstrate the control being exercised by the alleged beneficial owner as Debenture holder over the operations or any part of the company at any point in time. It is also pertinent to submit here that the option to convert the debentures has already expired and the debentures are being processed for repayment by the entities without being converted into equity.

8.4. The defendants argue that the jurisdiction in the present matter has been. assumed by the Initiating Officer illegally and erroneously as multiple properties combined into one attachment order which has no substance in fact. There is no bar on the Initiating Officer in processing multiple properties together and proceeding against if same set of facts governs the issues over multiple properties. In the present case the different benamidars are alleged to be connected to each other through a single beneficial owner and the Initiating Officer is trying to demonstrate the control of beneficial owner in totality. Therefore, he cannot be held wrong in handling and proceeding against these different entities in a single proceedings through same SCN and Orders,

8.5. Further, the argument of the defendants that the Defendant companies are Incorporated entities, which enjoy a separate legal entity status to those of their stake-holders and were holding the assets/subject properties independently in their own name is not required to be discussed in details as this is a mere repetition of the points covered on merits of the case. There is no dispute that the corporate bodies are separate and independent legal entities, the issue involved is whether these entities are holding properties for themselves or whether the Initiating Officer has proven that the said entities are holding properties on behalf of the alleged beneficial owner which is examined separately.

8.6. The defendants further argue that the Initiating Officer has failed to record the 'Reasons to Believe', which is a pre-requisite and sine qua non for issuance of SCN u/s 24(1). According to Section 24(1) of PBPT Act, if the Initiating Officer on the basis of material in his possession has reason to believe that any person is a benamidar in

respect of a property he may, after recording reasons in writing, issue a notice to the person to show cause why the property should not treated as benami property. In the scheme of the Act, the SCN is issued after recording the reasons and the SCN in the instant case do contain details of reason framed by the Initiating Officer. Further it has been communicated to the Defendants albeit not separately. But in essence the Initiating Officer has fulfilled the basic obligation. It could have been better worded or could have been communicated separately but in my opinion Such deficiency would not make this proceeding invalid. The fact is that the Initiating Officer has fulfilled the mandatory requirement of "reason to believe" in the form of SCN in respect of the properties covered by the said notice which is already on record and the sufficiency of the reasons cannot be examined by this authority under statute.

8.7. I do find merit in the submission of the defendant that the order passed u/s dated 25.04.2019, has been passed illegally without issuing any SCN u/s 24(1) and it is clearly in contravention of the provisions of the PBPT Act. The issuance of a Show Cause Notice u/s 240) is sine qua non for passing of the order o/s 24(4)(b), such requirement has been inserted in law in order to make the procedure fair and give the person whose property is being attached an opportunity to place on record evidence to show that his property is legitimate, untainted and not liable to be attached under the provisions of the PBPT Act, In this case, in respect of these properties, i.e., bank accounts, the Initiating Officer has not recorded reasons to believe or issued mandatory SCN to the alleged benamidars or the beneficial owner. Clearly the Initiating Officer could not have recorded the said properties to be benami properties, in the reasons, if any, that he would have recorded prior to issuance of SCN on 25.01.2019. Section 24(4) of the PBPT Act, 1988 says that the Initiating Officer, after making such inquires and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice under sub-section (1) In this case a lot of properties are attached without recording reasons and issuing SCN to all concerned. Thus, I agree that these are incurable and fatal lapses and Initiating Officer is clearly in breach of the provisions of the statute and the Older in hand is not maintainable for this reason alone.

8.8. The defendants have contended that the Initiating Officer has not given any justification for the passing of the provisional attachment order u/s 24(3). In this connection I must say the order under section 24(3) is purely interim in nature and once the order under section 2.4(4) is issued the significance is lost. Further, the said order is issued having regard to the belief formed with respect to the facts and circumstances prevailed at the relevant time and the sufficiency and necessity of the same need not be reopened at this stage.

8.9. The contention of the defendants that order u/s 24(4)(a)(i) dated 25.0412019 was issued after covering the matter under section 2(9)(A) and (C) is wrong, erroneous and illegal as it deviates from the original attachment order passed v/s 24(3) in which the section 2(9)(A). (C) & (D) were invoked has got some substance in it. While initiating a proceeding, the Initiating Officer has to be clear as to under which section he is proceedings and how the property, being the centre of action, is covered under the Act, The Initiating Officer initially covered the properties under section 2(9)(A), 2(9)(C) and later while passing order under section 24(4) he himself restricted to section 2(9) (A) and, In my opinion, the initiating Officer should not be vague and confused while initiating and concluding a proceeding under the Act. In the instant case, as the existence and applicability of section .2(9) (A) is already alleged by the Initiating Officer, then further sections cannot hold good for the same set of properties.

8.10. The defendants content that the Initiating Officer passed erroneous and illegal attachment orders, u/s 24(3) and 24(4) as he did not comply with the statut01Y and compulsory procedure for attachment of subject properties as prescribed in the PBPT Act and Rules having regard to Rule 5 of the PBPT Rules, 2016 which states that for the purpose of sub-section (3) of section 24, the Initiating Officer shall provisionally attach any property in the manner provided in the Second Schedule of Income-tax Act, 1961. The defence of the Initiating Officer is that this type of hyper technicalities are resulting from ignorance of section 63 of the PBPT Act, I do not agree with the Initiating Officer and hold that the section 63 speaks about the protection of validity of orders, notice etc. in case of mistakes, errors or omissions in a notice/

order, but section does not any protection from the lapse in any procedure laid down under statute.

8.11. The defendants further contents that the approval for the orders u/s 24(3) and 24(4)(a)(i). and 24(b)(i) as given by the Approving Authority is mechanical and perfunctory. The defendants argue that it has been held in various judgments that the sanctioning authority is obliged under the law to make independent application Of mind before granting any sanction or approval. Thus, any approval given on mechanical basis and without application of own mind of the sanctioning authority shall be void and thus all subsequent proceedings would be deemed (o be without any sanction and thus illegal and void, In this case the perusal of the records show that the Approving Authority has largely relied on the facts and findings of the Initiating Officer. He should have more diligently applied his mind in finding his own facts and justification before approving the notice and orders. However, this itself cannot be a reason to hold that the Adjudicating Authority has not applied his mind, If he is satisfied after going through the submission of the junior officer that they are sufficient, and approved it without recording further facts, it cannot said there is non application of mind, though we may feel he could have done better. Thus this alone cannot vitiate an order.

8.12. The defendant companies argues that they were incorporated for welfare and employee benefit scheme which was provided to select long serving employees of M/s Asian Star Company Limited and reward their loyalties transactions undertaken by the Defendants are bona-fide commercial transactions of its own and not Benami as being alleged. This argument is opposed by the Initiating Officer on the ground that the shareholding of ASCL as per BSE data is 74.66 as shown as promoter and promoter group holding and 25.34 is public shareholding. According to the Initiating Officer, the public holding includes the holding by the employees also through the said companies i.e., alleged benamidars and this is violation of law as they have not disclosed these employee holding to the BSE and MCA. In this connection, the initiating Officer has not been able to penal Action by the Bombay Stock Exchange 01 Ministry "Affairs in case of Violations if any.

8.13. The averment of the defendants that the Initiating Officer bas taken reliance of documents which have neither been provided to the Answering Defendant nor have been appended in the relied upon documents which are fatal and incurable legal lapses on his part and violation of principle of natural justice refers to the non-inclusion of the documents like reasons recorded by the. Initiating Officer for issuance of SCN u/s. 24(1); detailed note submitted to the Approving Authority for the approval of order u/s 24(4): Income Tax Return and other forms filed by the companies which are arrayed as party to the reference; shareholding disclosure of the company M/S Asian Star Company Limited 26 AS details of the companies arrayed as party to the reference; details downloaded and analysed from Ministry of Corporate Affairs; Details downloaded and analysed from Income-Tax Department etc. In view of the reply of the Initiating Officer that these documents are either incorporated in the SCN, order or available with the defendants or part of public domain, need not be submitted again and if any document is specifically required, the defendants were always at liberty to seek for the same, Considering this explanation, the contention is rejected.

8.14 The further contention of the defendants is that the Initiating Officer erroneously placed reliance on oral statements as recorded under a different proceedings and under a different law which are not admissible as evidence under a different statute. The submission is about the statements recorded under section 131 of the Income Tax Act which is being largely relied upon in the proceedings. I must say there is no harm in relying on any such record or statement as far as they themselves are valid and existing, but once a statement is retracted in subsequent proceedings, the said retracted statements cannot be used as evidence in the absence of substantiating evidences.

8.15 Another averment is that the onus of proving a benami transaction rests entirely on the shoulders of the Initiating Officer, making the charge and does not the acceptance of mere conjectures or surmises as a substitute for proof, this is not disputed. The Initiating Officer has attempted to discharge the said burden cast upon him, whether be has been successful in discharging the same is the subject matter of this adjudication proceedings.

9. The proceedings under the PBPT Act is initiated by issuing a Show Cause Notice under section 24(1) of the Act. In the present case, it is observed that in respect of the bank accounts listed above, the Initiating Officer passed the order under section 24(4)(b)(1) without initiating the proceedings and giving proper opportunity to the concerned. These bank accounts were not part of the Show Cause Notice issued in this case and as such the provisional attachment Issued under section 24(4) in respect of these bank accounts which were not involved in the SCN is not legally tenable or maintainable. The same fate is observed with the alleged loan amounts and the tenancy rights in an immovable property also as they are not a part of the proceedings initiated continuance of the provisional attachment order whereas in fact there was no provisional attachment order under, 24(3) in place in respect of these bank accounts and the loan amounts. If legally permitted in accordance with lay in all respects. The Initiating Officer sought to have ordered provisional attachment of the accounts, not the continence of provisional attachment which was in fact not existing. Further, mere mentioning of bank account numbers Without mentioning the balance is a total non application of mind and it is an order without eyen identifying the property. On these grounds itself the entire order in respect of these properties is vitiated in the eyes of law and the attachment ordered therein are not maintainable for total non- application of mind and jeopardizing the statutory provisions. Therefore, these items stand released without any further examination 011 merit.

It is apparent from the order U/S 24(3) and 24(4) that proceeding u/s 24(1) had its root in the survey operation undertaken in 2019 when it was gathered. that DI-D4 companies were holding the shares of "Asian Star Company Ltd" and that these 4 companies' entire business are based on the orders tor receipts from the Asian Star company Ltd. Thus, it was suspected that these four companies and their downstream "firms" were created only to park the funds of the alleged beneficial owner. Accordingly the proceedings were initiated and the impugned order was passed and referred for adjudication. It is observed that the Order and the Reference in hand are not presented in accordance with the basic principles of law. The description of the properties in question shown by the Initiating Officer in the statutory

notices/orders issued under various sections and the reference in hand are either incorrect, incomplete or illogical. The property and the description thereof are vital in any proceedings under the PBPT Act as the centre of action is the property. In the present case the property details including demat and bank accounts given in the Reference u/s 24(5) in a single table with contradicting facts within (PAN numbers shown as Demat numbers, Bank account numbers shown as DP ID). Further, according to the Initiating Officer the properties mean Demat Account Numbers and Bank Account Numbers having no mentioning about the balance/contents therein, There is no idea of the exact shares available in each demat account and whether shares in each account is attached or specific shares only are attached and reasons thereof. Though we cannot insist that the details of the shares should be clear with the Share Certificate Number and the Distinctive Numbers, at least the Initiating Officer should have taken the basic care to mention the Name of the Company and the Number of Shares held in the Demat Account. Hence this is a proceeding initiated without correct identification of the property.

11. Further, the Initiating Officer has mentioned in the Show Cause Notice and the order u/s 24(4) that the four benami partnership firms which are held by the four alleged benami companies have made huge investments and are holding huge quantity of the shares of M/s Asian Star Company Ltd, But there is no mention about the detail of any such share and not a single shale held by the said fitlns has been proceeded against. The four partnership firms have been alleged to be benamidars in the SCN issued under section 24(1) of the Act. But the 10 has not mentioned any property held by the said firms ill the SCN which is total non application of mind. As regards the shares alleged to be held by the benamidar companies in the demat accounts, the details of shares are not provided. The demat account itself cannot be held as a property. The real property is the shares kept in the account in a dematerialised form. The proceedings cannot be treated as complete and legal unless and until each share or lot is identified and found attributable to the alleged beneficial owner having regard to the source of acquisition along with the element of immediate or future benefit to the said beneficial owner, The statement of the Initiating Officer in the order in question that firm the balance sheet of the 4 companies, it was found that the

promoters and their family members of M/S Asian Star Company Ltd have -issued debentures to the companies is not understood generally companies issue debentures to the public individuals for raising fund from them, but an action of Certain individuals issuing debentures of companies is strange end appears to be a result of application of mind on the part of the Initiating Officer.

12. Another fact in the present case is that the reasons to initiate the proceedings are mainly based on the statements of many persons recorded under section 131 of the Income Tax Act, But during the proceedings under PBPTA all of them have retracted the earlier statements. Under such situation, the rebuttal and reinstating the alleged facts in the earlier statements is the responsibility of the Initiating Officer appending comparative evidences, without which the proceedings will fail by its own fate.

13. Again, it is the allegation that the copy of Show Cause Notice dated 25/1/2019 was sent to the alleged beneficial owner on 15/4/2019 only, it is the legal obligation on the part of the Initiating Officer under section 24(2) that a copy of the SCN is to be sent to the beneficial owner also. In the present case, the Show Cause Notice does not make an allegation that Shri. Vipul Shah is the beneficial owner. Further, the SCN, though framed under section 2(9)A) also, is silent as to who exactly is the beneficial owner. On perusal of the copy of the SCN forwarded along with the Reference, it is found that no copy has been marked to the alleged beneficial owner. The law stipulates that copy of the SCN is to be sent to the beneficial owner if his identity is known. In the present case, though the SCN discusses about the statements of Vipul Shah, there is no clear allegation that he is the beneficial owner, the question whether beneficial owner was known or not has to be answered with the sections of applicability invoked. As far as section 2(9XA) is invoked, there cannot be any presumption that the beneficiary owner is not known. But unfortunately, here things are contradicting to each other resulting in failure of the entire proceedings, Coming to the merits, it is fact that Benamidar I to Benamidar 4 are private Itd companies wherein majority Shares were held by employees and balance (less than 10%) shares were with the family members of Beneficial Owner. It is also a fact that major source of the profit of this company is coming out of the receipt of this company from M/s Asian Star Company

Ltd. These receipts have been reflected in the Income Tax Returns filed by these companies under signature of the Directors who are also employee of the Asian Star Company Ltd. Learned Counsel Shri Ashwani Taneja had led me through the various documents submitted including audited financial documents (from 1995 -2017) and OCD allotment letters wherein signature of Director. Mr. Atol D Oza appears. It was emphasized 'that Benamidar I to Benamidar 4 were all along functioning as separate corporate entity under separate directors. Further, these entities were subjected to scrutiny assessment U/s 143(3) and search assessment U.s 153C and no adverse findings as to bonafide of the transactions and activities of the company is there on record.

14. The audited Balance Sheets of D-1 from the year 1995 to 2017-18 was perused and it is apparent that in initial years loan/ borrowing from Aslan Star group companies were the actual and only source of the investment. made in Asian Star Company Limited, In financial year 2000, loan/ borrowing from group company was substituted by loan from shareholder, family member of the Beneficial Owner of Rs. 2.58 crore which was the main source for share investment of Rs. 3.07 crore. By financial year 2002, the mix of Surplus in Profit and Loss Account" in General Reserve of Rs, 77 Lac and loan of Rs. 4.5 crore was the source of total investment of IRS. 5.18 crore, In financial year 2008-09, Benamidar-1 has declared Total Income at Rs. 21 lacs, General Reserve of Rs, 2.21 crore, unsecured loan crore and the investment' in Asian Star Company Ltd of Rs. 5.57 crore, Thus character and find available in these called benami companies was always changing arid there was one-to-one or direct nexus of any contribution by the beneficial owner eyen in the form of loan to the investment made in ASCL In the next financial Year. Le.. 2009-10, the entire shareholding in Asian Star Company Ltd was transferred to the partnership firms. Thereafter the shares as well as resultant dividend were appearing the books of the Partnership Firms. Benamidar - DI is now receiving share of profit from Benamidar -5 and paying interest on the OCD These affairs are not disputed and there is an assessment order U/s143(3) read with section 153C in respect of DI accepting these affairs as such and not finding any irregularity. The share acquired by Benamidar1 is in the name of Benamidarl only (As Benamidar 5 is a firm who cannot hold share) and these

have not been declared as belonging to employee, similar pattern is observed on examining the balance sheets of other defendants also. In these set of facts, it has to be determined whether Beneficial Owner can be said to have paid consideration towards the share acquired and has he received benefit immediate or direct or indirect from these shares acquired. The shares acquired by the corporate entities (Benamidar 1 to Benamidar 4) since 1995 and transferred subsequently to firms (with 99% interest with corporate entities respectively) were acquired out of mix of loans from Beneficial Owner's family members and profit from the firm and the business income of the corporate entity, even if majority of business is from Asian Star Company Ltd, Only. The directors and the main person of these entities are either employee of Asian Star Company Ltd. or family members of the beneficial owner. Incorporation documents of these corporate entities as well as these affairs demonstrate that benefit of employees (of Asian Star Company Ltd.) was not on the radar. It appears that main purpose of holding of shares of "Asian Star" by these entities was to keep public holding in the shares above the limit of 25%. But these facts are not relevant for the purpose of deciding the nature of transaction i.e., holding of shares of "Asian Star" by the benamidar companies, For the purpose of any allegation under the PBPT Act, whether the alleged beneficiary owner has made any payment to the companies for acquisition of shares is the main question involved. The benefits being derived by the beneficial owner and not the benamidar should also be proved beyond doubt. Further, the payments received from the relatives or family members of the alleged beneficial owner, Asian Star or group companies cannot be treated as payment by the beneficial owner as these individuals or company are separate entities/individuals and cannot be legally clubbed with Shri. Vipul Shah. The various debentures issued to Shri. Vipul Shah and other have not been converted into shares and closing and the repayment of debentures are said to be in process, which the Initiating Officer is unable to contradict. Since these debentures are not converted into shares it shows that the benefit of more in the companies is unlikely. Further having regard to the period of issuance of debentures and period of acquisition of shares, it cannot be held that the funds raised out of these debentures have been utilised to acquire these shares.

15. To sum up the findings, it is apparent that the Initiating Officer has made his case of beneficial owner providing the consideration to DI to D8 on the basis of close proximity of all these entities with Asian Star Company Ltd, of which Shri. Vipul Shah and his family members are promoter all the red flags raised by the Initiating Officer point towards the close proximity and inter dependence of these entities. But all of these red flags like benamidar I-4 having same address, same contact number or of an employee of the ASCL total dependence on business provided by ASCL, changing shareholding in benamidar 1 to 4 between retiring employees and new employees without commensurate pay off, optionally convertible debenture subscribed in each benamidar by family members, loans being given to group concerns are not material far as basic limb of Section 2(9) (A) is concerned i.e., what are the evidences of beneficial owner providing the consideration to benamidar 1 to 4 for acquisition of shares (of ASCL)? All so called benami companies are existing since long as an independent entity and they have declared their business results in the said capacity since long. Thus source in the books of these entities from 1995 onwardshas also been declared in their audited books as well as Income total Returns and had already been accepted as such by the Income Tax authorities. In such circumstances a very heavy burden was placed on the Initiating Officer to establish that such declared source was falsehood and actual consideration has flown from the beneficial owner. Needless to say, the Initiating Officer had failed in this endeavour".

10.5 Conclusion- Considering the totality of the facts and circumstances of the issue involved, various evidences brought on record by the appellant, scrutiny assessment orders of the four brokers/commission agents and the order of the Ld. Ld. Adjudicating Authority (AA) under the Prohibition of Benami Properties Act, 1988, it is held that the impugned addition of Rs. 83,15,211/- as non-genuine commission expenses has got no merit and deserved to be deleted. The AO is directed accordingly. Thus, the grounds of appeal no. 4, 6 and 7 are allowed."

026. On careful examination of the order of the learned CIT – A, it is apparent that all the four entities are assessed by the same assessing officer, who have assessed in scrutiny assessment them and has charged the commission income shown by them. Therefore, in the hands of the recipient the learned assessing officer as such under the income from other sources taxes the commission income. While the same is treated as bogus commission expenditure in the hands of the assessee is a contradictory finding. If the learned assessing officer gives a finding in the hands of the recipient of commission, the respective commission income should have been taxed under the head income from undisclosed sources. This has not happened. The assessment order is in the hence of the recipient of commission are also passed Simon tenuously with the assessment order in the case of the assessee. On consideration of the statement prepared by the learned CIT – A in paragraph number 10.4.5 we find that in case of Nishant impacts private limited the commission income shown in the audited account and accepted in the respective assessment order of that company is Rs. nil whereas the commission paid by the assessee to that party is ₹ 5.99 lakhs. However, it is not the case that the sum has not been shown by that assessee in its profit and loss account, where the appropriate tax deduction at source is made by the assessee. The claim of the

assessee recorded at paragraph number 82 at page number 60 of the order clearly shows that all these parties have intimated to email response to the notice issued under section 133 (6) of the act. In their communication, those parties have submitted the Ledger confirmation reflecting the details of the transaction with the appellant as well as the debit not of the working of the commission along with their return of income. The photocopies of the email are available at page number 54 – 56 of the paper book. Therefore the finding of the learned assessing officer that out of four parties only three parties have responded. There is no credence in the finding of the learned assessing officer that the directors have confessed under section 132 (4) of the act with respect to the above commission expenditure because this statement was made in the year 2010 and is not related to the assessment year. Further the 153A assessment made their was not resulting into the addition of this commission expenditure. It is also to be recorded that during the survey action under section 133A of the act in case of the appellant, the statement of directors of 4 companies were recorded which were retracted before the income tax authorities as soon as receipt of statement from the assessing officer. Further, the order passed under the Benami properties act also clearly states that there is no evidence that these four entities are the Ben am concerns. Further, on

the commission expenditure debited by the assessee, the respective recipient of the commission have also charged service tax at the rate of 10% along with cess of 3%. This shows that the entities are also service provider to the assessee under the finance act 1994 relevant to service tax. The learned CIT – A also categorically recorded the nature of services rendered by these parties in paragraph number 10.4.1. The permanent account number of these parties was also available with the assessing officer as well as submitted by the assessee and undoubtedly, they are assessed by the same assessing officer. The assessment orders are passed in these entities accepting the commission income. So far as the nature of services are concerned, the assessee has submitted the copies of the debit not which clearly shows that commission is paid with respect to the exports made by the assessee. With respect to the details, assessee has mentioned invoice number and date, the fate of diamond, amount in US dollars and commission rate at the rate of 0.10% on the FOB value. Debit notes are available at page number 57 onwards of the paper book. Such debit notes also shows the service tax registration number of the parties. The decision of the honourable Gujarat High Court relied upon by the learned departmental representative was clearly on the issue that in that case the nature of services were not shown. In this case, the commission has

been paid on export of diamond stating the details of exports made by the assessee, respective commission and details of service tax collected thereon. The assessee has also produced the details of other commission expenditure incurred by the assessee at page number 65 onwards, which are also identical. Therefore, there is no reason to differentiate between the nature of services rendered by the commission expenditure accepted by the assessee as genuine and the details of alleged bogus commission expenditure. In view of this, we do not find any infirmity in the order of the learned CIT – A in deleting the disallowance of ₹ 8,315,211 of commission expenditure. Therefore, ground number 3 of the appeal is dismissed.

027. In the result, appeal filed by the learned assessing officer is dismissed.

Order pronounced in the open court on 23.05.2023.

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 23.05.2023
Sudip Sarkar, Sr.PS/ Dragon
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai

6. Guard file.

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai

Sr. No.	Particulars	Date	Initials	Person concerned
1	Draft dictated			Sr.PS
2	Draft placed before author			Sr.PS
3	Draft proposed & placed before the second Member			AM
4	Draft discussed/approved by Second Member			AM
5	Approved Draft comes to the Sr.PS/PS			Sr.PS
6	Kept for pronouncement on			Sr.PS
7	File sent to the Bench Clerk			Sr.PS
8	Date on which file goes to the Head Clerk			
9	Date of dispatch of Order			
10	Dictation Sheet is attached herewith			