

**आयकर अपीलिय अधिकरण, मुंबई “ डी” खंडपीठ**  
**Income-tax Appellate Tribunal -“D”Bench Mumbai**  
**सर्वश्री राजेन्द्र,लेखा सदस्य एवं, संदीप गोसाई, न्यायिक सदस्य**  
**Before S/Shri Rajendra,Accountant Member and Sandeep Gosain,Judicial Member**  
**आयकर अपील सं./I.T.A./7047/Mum/2016,निर्धारण वर्ष /Assessment Year: 2007-08**

Jitendra M. Kitavat (HUF) Prop. of M/s. Jivraj Exports 61, Purnima Apartment 43, Ridge Road, Mumbai-400 006. <b>PAN:ASSESEEBPK 9960 C</b>	Vs.	ITO 18(1)(5) Mumbai.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

**आयकर अपील सं./I.T.A./7100/Mum/2016,निर्धारण वर्ष /Assessment Year: 2007-08**

ITO 18(1)(5) Mumbai.	Vs.	Jitendra M. Kitavat(HUF) Mumbai-400 006
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

**Revenue by: Shri Rajesh Kumar Yadav-CIT-DR**

**Assessee by: Shri Vimal Punmiya**

**सुनवाई की तारीख / Date of Hearing: 23/02/2018**

**घोषणा की तारीख / Date of Pronouncement: 11/04/2018**

**आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश**  
**Order u/s.254(1)of the Income-tax Act,1961(Act)**

**खंडपीठ के अनुसार -Per Bench:**

Challenging the order dated,26/09/2015,of CIT(A)-29, Mumbai,the Assessing Officer (AO) and the assessee have filed cross appeals for the above mentioned assessment year (AY.).Assessee - HUF,engaged in the business of trading in bullion and jewellery,filed its return of income on 31/7/2007,declaring total income at Rs.3.18 lakhs.Initially the return was processed u/s.143(1) of the Act.Subsequently a notice u/s.148 of the Act was issued,as the AO was of the opinion that taxable income for the year under appeal has escaped assessment.The AO completed the assessment,u/s.143(3) r.w.s. 147 of the Act,on 30/3/2015,determining the income of the assessee at Rs.3.70 crores.

**ITA/7100/Mum/2016:**

2.Effective Ground of appeal,raised by AO,is about not sustaining addition of Rs.2.04 crores made under the head peak credit of transaction of bogus purchases.The AO had received information from the DGIT(Inv.),Mumbai regarding a search action which was carried out in the cases of Bhanwarlal Jain Group and Rajendra Jain Group.As per the information of the investiga

-tion wing, Bhanwarlal Jain (BJ) and other persons associated with him had admitted, under oath during the course of search, that they through their various benami concerns would provide accommodation entries for bogus purchases. On the basis of the information received that AO held that the assessee had obtained non genuine bills from M/s. Daksh Diamonds (DD) worth Rs. 2.04 crores. He made an addition of Rs. 2,04,30,250/- to the total income of the assessee, invoking the provisions of section 69 C of the Act. The AO further observed that BJ had explained the modus operandi and had confessed that the group was issuing bogus bills and was providing accommodation entries.

**3.** Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA) and made detailed submissions. After considering the available material, he observed that mere payment by account-payee cheques would not be sacrosanct. He referred to the case of Precision Finance (P) Ltd. (208 ITR 465) of the Hon Calcutta High Court, and held that the AO had held that the accommodation entries were given in form of cheques/ RTGS, that same were routed through bank accounts of about 70 bogus entities of BJ Group, that those evidences could not be overlooked, that the assessee had made purchases from some other parties probably in cash, that it had taken bills from the other parties to regularize the transactions. He referred to the case of Vijay Proteins Ltd. (58 ITD 428), Sanjay Oil Cakes (316 ITR 274) and Simit P Seth (356 ITR 451) and held that once the sale was accepted by the AO the very basis of purchases could not be questioned, that the entire purchase price could not be disallowed, that only the profit element embedded in such purchases could be added to the income of the assessee, that the estimation would vary with business to business. Finally, he held that in the case under consideration purchases were not beyond doubt, that the assessee had shown corresponding sales in the books of account, that what could be taxed was differential gross profit. He estimated the GP @ 12.5% and directed the AO to reduce the GP already shown by the assessee from the estimate.

**4.** During the course of hearing before us, the Departmental Representative (DR) stated that assessee did not produce the stock register during the assessment proceedings, that the AO had doubted the sales made by the assessee, that transactions routed through banking channels did not prove genuineness of the transactions, that notices issued u/s. 133(6) remained unserved, that there was no justification for restricting the addition to 12.5%.

The Authorised Representative (AR) argued that the AO had not provided opportunity of cross examining BJ, that from day-one the assessee was asking for cross examination, that it had raised

a specific ground before FAA about not following the principles of natural justice and denying the opportunity of cross examination by the AO, that the FAA wrongly stated that request by assessee was made late, that AO had rejected the books of account without finding any defect in them, that on the basis of uncorroborated statement of third parties books of accounts should not have been rejected, that assessee had filed the evidence to prove genuineness of purchases, that it had filed ledger account, copy of bank statement, confirmation letter from purchaser, acknowledgement of return of income for 2007-08 and bank statement of the supplier, that it had filed an affidavit of the supplier stating that disputed transaction was genuine. He further stated that VAT department had treated these transaction as genuine, that BJ had retracted his statement, that there was no evidence of cash withdrawal, that the stock register was maintained properly and was not doubted by AO, that the AO had not rejected the sales. He referred to cases of Indo Unique Trading Pvt.Ltd.(ITA.s/6341/ Mum/2016 & 6721/Mum/2016 AY.07-08,dtd.16/8/2017);wherein the addition made by AO were deleted by the Tribunal.In that case statement made by BJ were considered.He also relied upon the cases of Ronak Gems Pvt.Ltd.(ITA/3118/Mum/2017, AY. 2007-08,dated 04/10/2017);M/s.Vaman Internation l Pvt. Ltd.(ITA.s/1020 & 1041/Mum/2017,A.Y.2007-08,2008-09& appeals for other AY. s);Kaysons agencies Private Ltd.(ITA/3812/ Mum/2014,AY.2005-06,dtd.17/3/2017);M/s. F ncy Wear(ITA/1596/Mum/2016,AY.2011-12). He also referred to VAT audit report of Daksh Diamond pgs-1-20 of the PB;VAT returns filed by other suppliers were also referred to.Finally, he relied upon the order of the Tribunal in the case of M/s. Vama International(ITA.s/7315-7317/Mum/2016,AY.s2013-14,2012-13,2011-12, dtd.15/2/2018)wherein the Tribunal had deliberated upon identical issue i.e.alleged bogus purchases from BJ group.

**5.**Before proceeding further,we would like to reproduce the relevant portion of the order of the Tribunal in the case of Vama International(supra)which contains the facts of the case,arguments of the AR and the DR and the finding of the Tribunal.The order reads as under:

*“3 .Briefly stated the facts are that, the assessments for the Assessment Years 2011-12 to 2013-14 were reopened u/s. 147 of the Act based on the information received from DGIT(Investigation), Mumbai that the assessee is one of the beneficiaries of bogus purchases made by certain entities operated/managed by Bhanwarlal Jain group which is only a bogus concern. During the course of search, Shri Bhanwarlal Jain has admitted in the statement taken on oath u/s. 132(4) of the Act that he has indulged in providing accommodation entries and also admitted that these are paper companies with no real business transactions. It was also admitted by him that he was engaged in business of bill shopping through all the concerns due to which they do not have any physical stock of diamond with them at any of its places at any point of time. It was also admitted that they were*

merely lending names of various concerns to importer of diamonds who takes actual delivery. Based on this information from DGIT(Investigation) the assessments were reopened and in the course of re-assessment proceedings assessee was required to prove the genuineness of the purchases made from the entities operated by Shri Bhanwarlal Jain. Assessee furnished its submissions along with purchase bills, copy of ledger account, copies of bank statements etc. to verify the genuineness of the purchases. The Assessing Officer issued notices u/s.133(6) of the Act to the parties and some of the parties have confirmed that the transactions from the assessee was genuine. Parties have filed their acknowledgment of Income-tax return filed, copy of invoice, ledger account of the assessee firm in their books showing payments received from the assessee. However, the Assessing Officer not convinced with the submissions of the assessee and since no delivery challans were furnished to prove the delivery of goods have been actually made by the alleged suppliers to the assessee and since the Directors/ Proprietors of the supplier companies/firms have deposed on oath that all the concerns controlled and managed by them are not doing any real trading in diamonds but indulged in paper transaction only, the Assessing Officer rejected the submissions of the assessee that the purchases made from these entities are genuine. The Assessing Officer stated that the statement recorded from Shri Bhanwarlal Jain clearly established that the concerns controlled and operated by them are not carrying out any genuine business activity.

4. It was also observed by the Assessing Officer that the report received from the office of the DGIT (Investigation) during the course of post search inquiries the modus-operandi followed by the group concerns have been accepted by the key persons in the group. Even during the post search enquires Shri Bhanwarlal Jain admitted the fact that they are engaged in paper transaction only without any physical stock of the goods in the name of their numerous concerns they import rough and cut and polished diamonds for the other clients who do not want to show import in their own books. Further these concerns issued bills accommodation entries in a commission to various parties who normally purchases diamonds in cash from undisclosed parties and need bills to show purchases against sales in their account. Further these concerns also provide accommodation entries to unsecured loan against cash. Therefore, the Assessing Officer concluded that the transactions made by these entities managed by Shri Bhanwarlal Jain are only providing accommodation entries to the beneficiaries and assessee is one among such beneficiaries. Therefore, the Assessing Officer concluded that the material was debited against various suppliers have entered into stock register and the assessee has shown corresponding sales against the said purchases debited and this could only mean that the diamonds were brought by the assessee from the gray market without bill and to adjust these transactions into the Books of Accounts, assessee has obtained bills from Shri Bhanwarlal Jain group concerns. Therefore, he concluded that the assessee obtained only the bogus bills without movement of goods and goods were purchased in gray market by paying cash. Therefore, taking note of all these factors into consideration the Assessing Officer in so far as the Assessment Years 2012-13 and 2013-14 treated 12.5% of the purchases as non-genuine and in so far as Assessment Year 2011-12 is concerned 100% of the purchases were treated as bogus purchases.

5. The Ld.CIT(A) upheld the action of the Assessing Officer in treating the purchases as non-genuine as there is no movement of goods and it was admitted by Shri Bhanwarlal Jain that they are providing only accommodation entries and there was no real transaction. The Ld.CIT(A) also accepted the action of the Assessing Officer in disallowing certain percentage of impugned purchases, in view of the decision of the Hon'ble Gujarat High Court in the case of CIT v. Bholanath Polyfab Pvt. Ltd. [355 ITR 290] and CIT v. Simit P. Seth [356 ITR 451] and accordingly he estimated the profit element in the purchases at 12.5% for all the Assessment Years 2011-12 to 2013-14.

6. Before us the Learned Counsel for the assessee submits that assessee is into trading and export of diamonds and the disallowances were made only based on the admission of Shri Bhanwarlal Jain in the course of search and seizure proceedings and since the parties have confirmed that the transaction has entered into by the assessee are genuine the purchases cannot be treated as non-

*genuine, especially since sales are not disputed and they have accepted. Ld. Counsel for the assessee further submitted that, assessee submitted Copies of purchase invoices, Ledger confirmations, Copies of Bank Statements reflecting payments made to the suppliers and Stock register reflecting inward of goods purchased from them and corresponding sales in support of genuineness of its purchases. Learned Counsel for the assessee submitted that AO issued notices u/s. 133(6) calling for relevant details from the parties. Each of the party has replied and submitted Ledger A/c of the assessee in their books of accounts, Copies of Sales Invoices issued by them, Bank statements reflecting the payments made by the assessee to them, Copies of acknowledgement of Income-tax Returns filed by them, Audited Profit & Loss A/c and Balance Sheet for all the years involved. Ld. Counsel for the assessee submitted that none of the submitted documents have been doubted by the lower authorities. The sales made by the assessee included exports as well and thus, many of the purchases made from the impugned parties were exported out of India. Thus, it is submitted that the assessee discharged its onus to prove the genuineness of purchases made by it from the impugned parties.*

*7. Ld. Counsel for the assessee further submitted that none of the impugned parties have been declared as Hawala Dealers or Suspicious Dealers by the Sales Tax Department and the genuineness of the purchases have been doubted merely on the basis of a statement of a 7 third-party namely Mr. Bhanwarlal Jain. In fact, one of the parties i.e. M/s. Daksh Diamonds has been granted a registration under the new GST Act as well. The Sales Tax Department has not initiated any action against the assessee for disallowance of set-off in respect of VAT paid on the purchases from the impugned parties.*

*8. Learned Counsel for the assessee further submitted that the AO did not appreciate the fact that the assessee purchased diamonds from the impugned parties and there is a practice of hand delivery of such precious and low-weighting materials. Therefore no adverse conclusion can be drawn merely due to absence of documents proving deliveries*

*9. Ld. Counsel for the assessee submitted that, the credit period of six months is very common in the diamond industry. The AO's observation in the order for AY 2011-12 that unreasonable credit period has been granted by Daksh Diamonds is factually incorrect. The AO has mentioned that all the parties have been paid regularly except for Daksh Diamond. However, out of total purchases of ₹.9,47,27,364/- outstanding credits at the year-end were ₹.4,49,93,630 which is almost 50%. Even the purchase made prior to purchase from Daksh Diamond was also outstanding e.g. purchase of ₹.26,54,752/- from Vaishali Gems dated 22.10.2010.*

*10. Ld. Counsel for the assessee further submitted that the AO has asked the assessee to produce the parties without appreciating the fact that it was beyond the control of the assessee. The AO ought to have invoked the powers given to him under the Act by issuing summons to them requiring their personal attendance.*

*11. The facts and circumstances as outlined above, clearly suggest that the purchases by the assessee from M/s. Daksh Diamonds cannot be doubted but a major flaw in these transactions is the unverifiable nature of transactions of these purchases from M/s. Daksh Diamonds as it was not found available at the given address.”*

*However, Ld. Counsel for the assessee submitted that the fact is that the AO issued notices u/s. 133(6) to all the parties which were not only served upon them but were also responded by all of them.*

*12. Ld. Counsel for the assessee submitted that the Ld.CIT(A) agrees with the fact that the AO has merely relied upon the statement recorded by the Investigation wing and in-depth investigation was not carried out to the extent required. The Ld.CIT(A) ought to have made the investigation either on his own or through the AO which in his opinion was required before confirming any addition. The statements of Mr. Bhanwarlal Jain and others relied upon by the AO have been retracted by them. Learned 9 Counsel for the assessee submitted that the impugned parties have been engaged into*

imports as well which evident from the audited P & L Account submitted by them. This fact has also been noted by the AO in his order.

13. The Ld. Counsel for the assessee further submitted that the GP margin earned by the assessee from sale of materials purchased from the impugned parties is comparable with the margin earned from other transactions. The addition @12.5% would distort this position and it would show unrealistic results as mentioned below: Year Overall GP% GP% in other transactions GP% in the impugned transactions GP% after considering addition @12.5% 2011-12 5.49% 5.15% 5.01% 16.88% 2012-13 6.31% 4.50% 4.66% 16.57% 2013-14 6.32% 3.97% 3.72% 15.85%

14. Thus the Learned Counsel for the assessee submitted that the purchases are not bogus and they cannot be treated as non-genuine. Therefore, pleaded to delete the addition/disallowance made by the Assessing Officer.

15. Ld. DR vehemently supported the orders of the authorities below. Ld. DR further submits that as per the CBDT instructions profit margin for the diamond trade is 6% and therefore at least 6% is to be estimated as the profit element from these purchases following the CBDT Instructions.

16. We have heard the rival submissions, perused the orders of the authorities below. In this case the assessments were reopened based on the information from the DGIT(Investigations), Mumbai that assessee is a beneficiary from the entities operated by Shri Bhanwarlal Jain wherein the search took place and it was found that Shri Bhanwarlal Jain is providing only accommodation entries and there were no actual sale transactions. Assessing Officer observed that the assessee could not prove the movement of goods from the suppliers to the assessee. In the absence of delivery challans and based on the statements of Bhanwarlal Jain that they have provided only accommodation bills, the Assessing Officer has concluded that the assessee has obtained only bogus bills and assessee might have purchased goods in gray market. The Assessing Officer estimated the Gross Profit Margin on such purchases at 12.5% for the Assessment Years 2012-13 and 2013-14. For the Assessment Year 2011-12 the entire purchases were treated as non-genuine. The Ld.CIT(A) taking note of the submissions of the assessee as well as the averments of the Assessing Officer and various case laws estimated the profit element from these purchases at 12.5% for all the Assessment Years 2011-12 to 2013-14. The Ld.CIT(A) in his order observed as under:

“11. I have carefully gone through the assessment order passed by the Assessing Officer and the written submissions of the appellant on the issue. I have also considered various case laws relied upon by the appellant. My observations are as under.

12. The AO has formed his view about the bogus nature of the purchase made by the appellant from M/s.Daksh Diamonds on the basis of various incriminating documents and evidences seized during the course of search & seizure action in the case of Bhanwarlal Jain Group, which has established that the said group was engaged in providing accommodation entries of bogus sales/purchases/loans to various beneficiaries.

13. In my opinion, simply relying upon the information received from the DGIT (Inv.) regarding the default committed by M/s. Daksh Diamonds cannot be taken as the sole basis to treat the entire purchases made from it as bogus or non-genuine. The Assessing Officer has primarily relied on the conclusions drawn by the Investigation Wing on the basis of the statement given before the Income tax authorities and heavy reliance on such statement to treat entire purchases made from the above party as bogus, cannot be held to be justified. The information received from the DGIT(Inv.) was a piece of evidence to initiate in-depth independent investigation on the issue,

which the Assessing Officer has not fully carried out. Further full enquiry on the given set of facts and circumstances and without appreciating the evidences submitted by the appellant in respect of the purchases made from the alleged bogus party has remained to be carried out before arriving at the conclusion that impugned purchase debited in the books of the appellant are bogus.

14. It is not the case of the Assessing Officer that the above party i.e. M/s. Daksh Diamonds specifically stated that it had made bogus sales to the appellant. The purchase invoices, payments to the parties through cheques and closing stock inventory submitted by the appellant are certain important evidences regarding the purchases made by the appellant that cannot be set aside summarily. Therefore, the conclusion drawn regarding the purchases made from M/s.Daksh Diamonds being entirely bogus, is not justified.

15. In this regard, the ratio was laid down by the Hon'ble High Court of Bombay in the case of CIT v.Nikunj Eximp Enterprises(P.)Ltd.,is very relevant,wherein it was held that-

*"When the assessee have filed letter of confirmations of the suppliers, Bank statements highlighting the payment entries through account payee cheque, copies of invoices, stock reconciliation statements before the AO; and merely because the suppliers did not appear before the AO, one cannot conclude that the purchases were not made by the assessee. The AO cannot disallow the purchases on the basis of suspicion because the suppliers were not produced before them."*

16.The facts and circumstances as outlined above, clearly suggest that the purchases by the appellant from M/s.Daksh Diamonds cannot be doubted but a major flaw in these transactions is the unverifiable nature of transactions of these purchases from M/s. Daksh Diamonds as it was not found available at the given address. Thus the purchase prices shown on the invoices are not subjected to verification and as such it was difficult to establish the correctness of the purchase prices paid for the materials purchased from them. Such verification of the sale price shown on the invoices/bills was necessary to ascertain the correctness of the profits shown by the appellant for the period under consideration. This verification was also vital to determine as to whether the purchase prices shown on the bills/invoices, are as per prevailing market prices of the materials purchased and to ascertain that the price paid for the materials purchased from M/s.Daksh Diamonds is not over invoiced. In the absence of any such verification of the correctness of the price paid for the materials purchased by the appellant, the purchase price paid as mentioned on the invoices/bills cannot be accepted as the correct price paid for the goods purchased from M/s.Daksh Diamonds. In view of the same, the possibility of over-invoicing of the materials purchased to reduce the profit, 'cannot be ruled out. Therefore, the gross profit rate shown by the appellant for the year under consideration cannot be relied upon. In the circumstances, the correct approach in such transactions would be to estimate the additional benefit or profit earned on these purchases and not to disallow the entire purchases from M/s. Daksh Diamonds. The disallowance of the entire amount of purchases from M/s.Daksh Diamonds would not be logical and would amount to travesty of justice. In my view either the purchases from above mentioned party are over invoiced or the purchases were actually made but not from the said party from

which it was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation.

17. As of now the issue of bogus purchases has been much discussed and debated by the various courts and tribunals. In many judicial pronouncements on the issue, the courts have taken a consistent view that in case of non-existent parties from whom the purchases are shown to have been made, only part of such purchases can be disallowed, particularly in the cases where the corresponding sales are not doubted. Alternatively, the profit embedded in such sales against the alleged bogus purchase, can only be brought to tax.

18. In the case of CIT-1 Vs Simit P. Sheth, ITA no. 553 of 2012, order dated 16.01.2013, while deciding a similar issue the Hon'ble High Court of Gujarat has held that:

*“We are broadly in agreement with the reasoning adopted by the Commissioner (Appeals) with respect to the nature of disputed purchases of steel. It may be that the three suppliers from whom the assessee claimed to have purchased the steel did not own up to such sales. However, vital question while considering whether the entire amount of purchases should be added back to the income of the assessee or only the profit element embedded therein was to ascertain whether the purchases themselves were completely bogus and nonexistent or that the purchases were actually made but not from the parties from whom it was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation. In the present case, CIT believed that when as a trader in steel the assessee sold certain quantity of steel, he would have purchased the same quantity from some source. When the total sale is accepted by the Assessing Officer, he could not have questioned the very basis of the purchases. In essence therefore, the Commissioner (Appeals) believed assessee's theory that the purchases were not bogus but were made from the parties other than those mentioned in the books of accounts. That being the position, not the entire purchase price but only profit element embedded in such purchases can be added to the income of the assessee. So much is clear by decision of this Court. In particular, Court has also taken a similar view in case of Commissioner of Income Tax-IV vs. Vijay M Mistry Construction Ltd. vide order dated 10.01.2011 passed in Tax Appeal No. 1090 of 2009 and in case of Commissioner of Income Tax-I vs. Bholanath Poly Fab Pvt. Ltd. vide order dated 23.10.2012 passed in Tax Appeal No. 63 of 2012. The view taken by the Tribunal in case of Vijay Proteins Pvt. Ltd. Vs. CIT reported in 58 ITD 428 came to be approved.” (Emphasis supplied)*

19. Similarly while dealing with an identical issue, in the case of CIT v. Bholanath Poly Fab (Purchase)Ltd. ITA.No.No. 63 of 2012, in the order dated 23/10/2012, the Hon'ble High Court of Gujarat has held as under:-

*“We are of the opinion that the Tribunal committed no error. Whether the purchases themselves were bogus or whether the parties from whom such purchases were allegedly made were bogus is essentially a question of fact. The Tribunal having examined the evidence on record came to the conclusion that the assessee did purchase the cloth and sell the finished goods. In that view of the matter, as natural corollary, not the entire amount covered under such purchase, but the profit element embedded therein would be subject to tax. This was the view of this court in the case of Sanjay Oilcake Industries v. CIT (2009) 316 ITR 274 (Guj). Such decision is also followed by this court in a judgment dated August 16, 2011, in Tax Appeal No. 679 of 2010 in the case of CIT v. Kishor Amrutlal Patel. In the result, tax appeal is dismissed.”*

20. In view of the facts and circumstances and the judicial pronouncements cited above; what can be disallowed or taxed in the instant case of the alleged bogus purchases is only the excess profit element embedded in such purchases shown to have been made from M/s.Daksh Diamonds. The appellant has not placed any evidence on record that the goods were purchased from the above party at arms' length price. The appellant has also not placed on record any comparable bills/invoices for purchases of similar items made from other parties to establish that the purchases from M/s.Daksh Diamonds in question was at par with the purchases made from other parties during the period under consideration. The possibility of such purchases from unregistered dealers without invoices cannot be ruled out. Hence possibility of such purchases from unregistered dealers without invoices cannot be ruled out. In view of the above, the correctness of the purchase prices mentioned on such bills/invoices issued by M/s.Daksh Diamonds in question cannot be accepted and some additional profit needs to be estimated on such purchases made from M/s.Daksh Diamonds. As the purchases invoices issued against the alleged bogus purchases remains unverifiable, and part of the profit element on the purchases made from M/s.Daksh Diamonds already included in the above gross profit rate shown for the year under consideration, it would be fair and just, if the additional gross profit @ 12.5% is applied on such total alleged bogus purchases amounting to Rs.1,05,18,970/-,the additional gross profit on such purchases would come to Rs. 13, 14, 871/- which need to be added to the income of the assessee on account of alleged bogus purchases for the year under consideration and the balance addition made amounting to Rs. 92,04,099/-is hereby deleted. The Assessing Officer is directed accordingly. Hence, grounds no. 1 & 2 are partly allowed.”

*17. As could be seen from the above the Ld.CIT(A) did not agree with the Assessing Officer that the purchases by the assessee are bogus/non genuine. However, the Ld.CIT(A) observed that purchases made cannot be doubted and there is a major flaw in these transactions is the unverifiable nature of transactions as the parties are not found available in the given address. However, we see that the parties have responded in these cases for the notices issued u/s. 133(6) of the Act, they have filed Ledger Account of the assessee in their books of accounts, Copies of Sales Invoices issued by them, their Bank statements reflecting the payments made by the assessee to them, Copies of acknowledgement of Income-tax Returns filed by them, Audited Profit & Loss A/c and Balance Sheets to show that the transactions of sales made to the assessee are genuine. On a careful consideration of the submissions made by the assessee, we find considerable force in the submissions not to treat the purchases made by the assessee from the parties as non-genuine/bogus.*

*18. The reason for treating these purchases as non-genuine /bogus is the statements given by Bhanwarlal Jain group and non-submission of delivery invoices by the assessee. It is the submission of the assessee that the statements given by Bhanwarlal Jain group have been retracted by them subsequently and there is a practice of hand delivery of such precious and light weighing materials like Diamonds is prevailing in the industry. Therefore, no adverse conclusion can be drawn merely due to absence of documents proving deliveries. The analysis furnished before us on the Gross Profit margin shown by the assessee also suggest that assessee is consistent in showing overall Gross Profit around 6% in these Assessment Years. The average Gross Profit shown by the assessee stood at 6.04% for these Assessment Years. Therefore even if we go by the submissions of the Ld.DR that the profit element should be estimated at 6% as per the CBDT Circular the assessee has already shown 6.04% of overall Gross Profit during these three Assessment Years. The disallowance/estimation of profit on purchases by treating them as bogus cannot be made only on the statements recorded from third parties, especially when those parties have responded to the notice issued u/s.133(6) of the Act by filing all necessary documents to prove that they have made sales to the assessee. It is also the*

*submission of the assessee that none of the impugned parties have been declared as Hawala dealers or suspicious dealers by the Sales Tax Department and the genuineness of the purchases have been doubted merely on the basis of the statement given by the Bhanwarlal Jain group. The assessee has furnished all necessary evidence to prove the genuineness of the purchases, the parties have also responded to the notices u/s. 133(6) of the Act by filing necessary evidence as to prove that the purchases are genuine. Thus the assessee discharged the onus to prove the genuineness of the transactions made by the assessee from the impugned parties. The Assessing Officer completely failed to make further enquiries in these cases. The documents furnished by the supplier of the goods have not been disproved by the Assessing Officer in these matters.*

*19. We also find that the Coordinate Bench in the case of Indo Unique Trading Pvt Ltd. v. DCIT in ITA.No. 6341/Mum/2016 considered almost an identical situation wherein the suppliers have responded to the notices issued u/s. 133(6) of the Act and confirmed the transaction by filing various details before the Assessing Officer, in such circumstances the Coordinate Bench accepted the contentions of the assessee that the purchases cannot be treated as bogus simply relying on the statements in the case of Bhanwarlal Jain group. While holding so the Coordinate Bench observed as under: -*

*“10. We have heard rival contentions and perused the record. We notice that the assessing officer has reopened the assessment for the second time after expiry of four years from the end of the assessment year, on the basis of information received from the investigation wing about the bogus nature of transactions entered by Shri Bhanwarlal Jain group. Even though the AO has mentioned the reasons that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, yet he has not specified the manner of failure.*

*11. On the contrary, we notice that the assessee has proved the genuineness of purchases by obtaining confirmation letters in the form of affidavits from all the suppliers. The AO has done independent enquiry during the course of assessment proceedings by issuing notices u/s 133(6) of the Act to all the suppliers. We notice that the notices were duly served upon the suppliers and they have also responded by filing their replies duly confirming the transactions. The AO has rejected the replies by observing that the replies lacked details and they did not mention about the nature of transactions. In our view, the said observations are vague in nature. On the contrary, a perusal of the affidavits furnished by the suppliers would show that they have confirmed the sales effected by them to the assessee. Further they have also verified and signed the ledger account copies as available in the books of account. When the suppliers confirm that the transactions of sales made by them to the assessee are genuine, that too, in response to the notices issued by the AO u/s 133(6) of the Act during the course of assessment proceedings, in our view, the said replies cannot be rejected without bringing on record any material to show that they are not true. We notice that the AO did not bring any material on record and he simply relied upon the report given by the investigation wing. As per Ld A.R., the statement given by Shri Bhanwarlal Jain is a general statement only. The assessee, as stated earlier, has furnished confirmation of ledger accounts and also affidavits to prove the genuineness of transactions. We notice that the AO could not controvert those documents.*

*12. In view of the foregoing discussions, we are of the view that the assessee has duly discharged the burden to prove the genuineness of purchases. On the contrary, the AO has simply relied upon the report given by the investigation wing. In this view of the matter, we are of the view that no addition is called for on account of alleged bogus purchases. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the impugned addition.”*

*20. In view of what is discussed above, we are of the view that the assessee has duly discharged its burden of proving the genuineness of the purchases and the Assessing Officer without making proper investigation, simply relied on the statements of third party to treat the purchases as bogus. Assessing Officer could not prove that the information furnished by the suppliers are not genuine so as to treat*

*the sales made by them are only bogus. In the circumstances, we set aside the orders of the lower authorities and delete the disallowance made towards bogus purchases for all these Assessment Years i.e. 2011-12 to 2013-14 which are under appeal before us.*

*21. In the result, appeals of the assessee are allowed.*

Considering the above, we are of the opinion that the issue of bogus purchase of diamonds from BJ group has been already been deliberated upon by the Tribunal and it stands decided. Facts of the case under consideration are almost identical to the facts of Vama International (supra). In that case also the AO had added the entire purchases to the income of the assessee and the FAA had given part relief to the assessee. In the instant case, the assessee was denied the opportunity of cross examination though it had made a request to the AO during the assessment proceedings. By not allowing cross examination of the third party, whose statement was being used against the assessee, the AO had violated the basic principles of natural justice. Only on that count the order can be quashed. But, we are considering other factors. BJ has retracted his statement. So, the authenticity of the material relied upon by the AO reduces to a great extent. The supplier has admitted the transaction and the AO has not doubted the sales. It is also found that DD had filed VAT returns. Considering all these facts and respectfully following the order of the Tribunal in the case of Vama International (supra), we decide the effective ground of appeal against the AO.

**ITA/7047/Mum/2016:**

6. During the course of hearing before us, the AR did not press first five grounds of appeal. Hence, same stands dismissed as not pressed.

7. Ground no. 6 is about direction given by the FAA to the AO to estimate the profit of 12.5% of the purchase from DD. The assessee has also objected to addition of Rs. 25.53 lakhs to its income and invoking of section 69C of the Act.

7.1. While deciding the appeal filed by the AO, we have decided the issue against the AO. Following the same, we decide ground no. 6 in favour of the assessee. We are also of the opinion that provisions of section 69C are not applicable in case of alleged bogus purchases.

8. Next Ground of appeal is about addition of Rs. 1.63 crores. During the assessment proceedings, the AO found that the assessee had taken unsecured loans of entry of Rs. 1,63,26,190/-. After discussing the modus operandi followed by BJ Group, the AO treated the amount in question as unexplained cash credit, invoking the provision of section 68 of the Act.

**8.1.**In the appellate proceedings before the FAA,the assessee made detailed submissions.After considering the assessment order and the submission of the assessee,the FAA held that the assessee had received unsecured loan of Rs.1.63 crores from M/s.Little Diam(LD),that it had admitted that loan was received through banking channels and that same could not be considered as unexplained cash credit,that during the appellate proceedings the assessee had changed its stand,that before him the assessee claimed that it had received advances from LD,that it was also claimed that advances received were for business purposes and that disputed amount was returned back to LD.The FAA further observed that it did not furnish details of the business deals which did not materialise,that as per the affidavit of LD advance of Rs.1.63 crore was outstanding as on 31/3/2007,that in other cases the assessee had first made purchases and the payments were made subsequently.Finally,he upheld the order of the AO.

**8.2.**Before us,the AR argued that supporting evidences-to prove genuineness of loan like ledger account,bank statement,confirmation letter,purchase bill,copy of return of income filed by LD for the year under appeal-were submitted before the departmental authorities,that in its affidavit LD had admitted of advancing loans,that identity, creditworthiness and genuineness of the transactions were proved beyond doubt,that money was returned back to the lender in the subsequent year,that LD had admitted receiving back the money,that the assessee was one of the creditors of LD.He referred to the cases of Sanghavi Reality Pvt.Ltd.(ITA.s/3018-20/Mum/2017 AY.2008-09-2011-12),Vikram Muktilal Vora(ITA/842/Mum/2017,AY.2007-08),Gujarat Construction(ITA/7040/Mum/2016,AY.2007-08)

**8.3.**We have heard the rival submissions and perused the material before us.We find that the FAA had observed that the transaction with LD could not be considered genuine as it had advanced unsecured loans to the assessee.It is found that LD in its affidavit has admitted that it had advanced loan to the assessee.

Here we would like to refer to the case of Reliance Corporation (ITA/1069-71/Mum/ 2017, AY.2008-09 to 2010-11,dtd.12/04/2017)wherein the similar issue was dealt with.In that case also,on the basis of search and seizure operations carried out in the case of BJ, additions u/s.68 were made to the total income of the assessee.We are reproducing the relevant portion of the order and it reads as under:

*4.Facts of the case are that the assessee filed its return of income on 15.10.2010 declaring a total income at Rs.56,732/-.The return was processed under section 143(1) and the assessment was*

completed u/s 143(3) assessing and other three appeals the total income of the assessee at an income of Rs.33,82,280/- vide order dated 20.3.2013. The case of the assessee was re-opened under section 147, on the basis that the information has been received from DGIT(Inv), Mumbai upon search and seizure action u/s 132 of the Act carried out on the group of Shri Bhanwarlal Jain that the assessee has received accommodation entries from the said parties/ concerns managed and operated by him. According to the information, the assessee obtained accommodation entries in the form of unsecured loans from M/s Laxmi Trading Company, M/s Rose Impex and Megha Gems, which are belonging to Shri Bhanwarlal Jain. The AO accordingly formed an opinion that the income to the tune of Rs.2,02,62,016/- has escaped assessment within the meaning of section 147 of the Act and accordingly reopened the assessment by issuing notice under section 148 of the Act dated 18.3.2015 and ultimately the assessment was completed vide order dated 4.3.2016 passed under section 143(3) read with section 147 of the Act assessing the total income of the assessee at an income of Rs.1,66,31,511/- as against the earlier assessment made at Rs.33,82,280/- made under section 143(3) dated 20.3.2013 thereby making two additions namely unexplained cash credit from the parties referred hereinabove of Rs.1,29,04,231/- and unexplained expenditure of Rs.3,45,000/- under section 69C of the Act. The assessee filed before the AO various informations/details like loan confirmations from the lenders, ledger account, PAN of the parties, Profit & Loss account and the and other three appeals balance sheet etc including the bank statement of the lenders and also of the assessee confirming the receipt of money through banking channel and form No.16 qua the TDS deducted. The lenders confirmed the loans having been given to the assessee during personal appearance before the AO in response to notice u/s 133(6) of the Act. However, the AO acting solely on the information received from DGIT(Inv), Mumbai rejected the contentions of the assessee and framed the assessment as stated above.

5. Aggrieved by the order of the AO, the assessee preferred an appeal before the Id.CIT(A) who dismissed the appeal of the assessee ex-parte on the ground that the assessee failed to appear before the Id.CIT(A) by observing and holding as under :

“4 Decision on grounds of appeal no 1: 4.1 The relevant facts are like this. The assessee is a firm which is engaged in the business of builders & developers. A search & seizure action was conducted in the Bhanwarlal Jain group of cases by Investigation Wing Mumbai. As a result of search, it was found by the Investigation Wing that this group is a leading entry provider of Mumbai. There are many concerns floated by the group who provide accommodation entries of bogus loan. The AO received an information that the appellant has also taken loan from concerns found in the list of entry providers related with Bhanwarlal Jain group of cases. The AO asked the appellant to show cause as to why loan taken from M/s Laxmi Trading Company & M/s Rajan Diamonds should not be disallowed and added to the total income. As per the assessment order the appellant did not file any written submission on this issue. The AO added the amount of fresh loans and interests on existing doubtful loans paid during the AY 2010-11 to the total income of the appellant. In this way, addition of Rs.1,29,04,231/- was made to the total income of the appellant and other three appeals

4.2 During the course of appeal proceedings, no one appeared nor was any written submission made. In the statement of facts and grounds of appeal only general facts are stated. In absence of any written submission against the view taken by the AO in the assessment order it is held that the AO has rightly made the addition. The grounds of appeal No.1 is accordingly dismissed.

5 Decision on grounds of appeal no.2:

5.1 As per the assessment order the AO took a view that the appellant had introduced unexplained cash credits from entities related with Bhanwarlal Jain group of cases through accommodation entries arranged on commission basis. The AO accordingly computed 3% of Rs

1,15,00,000/- as undisclosed expenditure within the meaning of section 69C of the Act. In this way addition of Rs 3,45,000/- was made to the total income of the appellant.

5.2 During the course of appeal proceedings, no one appeared nor was any written submission made. In the statement of facts and grounds of appeal only general facts are stated. In absence of any written submission and/or document to substantiate the argument of the appellant against the view taken by the AO in the assessment order it is held that the AO has rightly made the addition. The grounds of appeal no.2 is accordingly dismissed. Aggrieved by the order of the FAA, the assessee is in appeal before us.

6. The ld. AR vehemently submitted before us that the order upholding the addition by the FAA was wrong and against the provisions of the Act. The ld. AR respectfully submitted before the Bench in order to make addition u/s 68C of the Act when the following three things are not established i.e. (i) identity of the creditors (ii) genuineness of the transactions and (iii) creditworthiness of the creditors. The ld. AR submitted that the onus is cast upon the assessee to explain the sources from which he has received the cash credit and the creditworthiness of the creditors is to be gauged vis –a-vis the transactions and other three appeals which occurred between the assessee and the creditors. The ld. AR submitted that it was not the burden or responsibility of the assessee to find out the source of creditors or the capacity of the creditors in order to prove the genuineness of transactions as has been held by the Hon'ble Gauhati High Court in the case of CIT V/s Smt. Sangmitra Bharali reported in 361 ITR 481). The ld AR further submitted that the addition was made out of unsecured loans raised by the assessee from the group concern of Bhanwarilal Jain Group engaged in providing accommodation entries. On the contrary, there was no indication or proof that loans taken by the assessee were merely accommodation entries and the money actually gone back to the lenders. The ld. AR also submitted that the creditors appeared before the AO in response to the notice issued u/s 133(6) and during the course of recording statements by the AO the lenders confirmed the loans having given to the assessee. Besides all the necessary details were submitted before the AO during the assessment proceedings. The assessee also provided the loan confirmation from the creditors, PAN of creditors ledger extract copy of Income tax return, profit and loss account, balance sheet and bank statement of the creditors and also of the assessee and form no.16 issued qua the TDS deducted and deposited. The ld. AR further submitted that the assessee has completely discharged its onus cast upon it by filing necessary informations/details before the AO and the AO without carrying out any further investigations and verification in the matter solely relied upon the information received from the DGIT(Inv) Mumbai that the creditors were engaged in issuing accommodation entries. In support of his contention, the ld. AR relied on the decision of the Hon'ble Supreme Court in the case of ITO V/s Lakhmani Mewal Das reported in (1976) 103 ITR 437 (SC), the decision of the Hon'ble Delhi High Court in the case of CIT V/s Gangeshwari Metal (P) Ltd reported in (2013) 96 DTR 299, wherein it has been held that there was a clear lack of enquiry on the part of the AO. Once the assessee had furnished all the material including PAN, loan confirmations and bank statements, in such an eventuality, no addition can be made u/s 68 of the Act. According to the ld. AR, the AO merely proceeded on the basis of information received from the third party and framed the assessment by making additions by stating in the assessment order that the explanation of the assessee is not acceptable. The ld. AR further relied upon the number of decisions like :

- i) CIT V/s Varinder Rawley (2014) 366 ITR 232 (P&H);
- ii) CIT V/s Sachital Communications (2014) 227 Taxman 219 (Mag);
- iii) CIT V/s Patel Ramniklal Hirji (2004) 222 Taxman 15 (Mag);
- iv) CIT V/s Jaikumar Bakliwal (2014) 366 ITR 217 (Raj);
- v) Nemi Chand Kothari V/s CIT (2003) 264 ITR 254(Gauhati);
- vi) CIT V/s Shalimar Buildwell Pvt (2014) 220 Taxman 138 (All);
- vii) CIT V/s Lalpuria Construction P L (2013) 215 Taxman 12(Mag) (Raj)
- viii) M/s Rushabh Enterprise V/s ACIT (Mum) WP 167/2015 and other three appeals

- ix) *Andaman Timber Industries V/s CCE (2015) 281 CTR 0241 (SC)*  
x) *CIT V/s M/s Ashish International in ITA 4299/Mum/2009*

7. *Per contra, the ld.DR relied upon the orders of the authorities below by submitting that the loan creditors M/s Bhanvarilal Jain group was found to be engaged in the business of providing accommodation entries during the search and seizure action his group and the assessee was found to be the one of the beneficiaries of the said accommodation entries. The ld. DR submitted that in the present case though the assessee has filed all the necessary information but since the assessee borrowing monies from the tainted parties who were provided accommodation entries, it is beyond doubt that money borrowed by the assessee was nothing but accommodation entries. Lastly, the ld. DR prayed that in view of the facts and the order of the FAA should be upheld by dismissing the appeal of the assessee.*

8. *We have heard the rival contentions perused the material placed before us including the orders of authorities below and orders relied upon by the parties. We find that undisputedly the assessee has borrowed money by way of loan from three aforesaid three parties i.e M/s Laxmi Trading Company, M/s Rose Impex and Megha Gems from whom the assessee borrowed the money and total outstanding including the interest as on 31.3.2010 were amounting to Rs.1,29,04,231/-. The case of the assessee was re-opened upon receiving the and other three appeals information from DGIT(Inv), Mumbai that the assessee was one of the beneficiary of the said accommodation entries provided by Mr.Bhanwarlal Jain and group. We find from the record that the assessee filed during the course of assessment proceedings all the details like loan confirmation letters from the creditors, PAN of the creditors, bank statements of the creditors and the assessee, form no.16 qua TDS on interest, profit and loss account and balance sheet including the ledger account of the creditors, and ITR etc. Moreover, the loan creditors also appeared before the AO in compliance to the notice issued under section 133(6) of the Act and filed confirmations before the AO that loans were actually given to the assessee. From all these details and facts on record, we find that the assessee has discharged its onus cast upon it by filing all the necessary details as called for by the AO to corroborate the transactions of borrowing the money and thereby satisfied all the three main ingredients i.e. creditworthiness of the creditors, genuineness of the transactions and identity of the creditors by filing all the details as discussed above which proved that the identity of the creditors, genuineness of the transactions and creditworthiness of the creditors have been established by the assessee. So much so that the loan creditors in response to the notice issued under section 133(6) appeared before the AO and confirmed that they have given interest bearing loans to the assessee on which TDS have been deducted and paid and form no.16A issued to the loan creditors also filed before the AO. Once the assessee has filed all and other three appeals the necessary documents before the AO then the onus is shifted to the department to disprove the stand of the assessee, which department has failed to do so in the present case. The AO has merely proceeded and relied on the information received from the DGIT(Inv), Mumbai that the assessee is one of the beneficiary of the accommodation entries without bringing any material against the assessee on record by contrary to the defense put up by the assessee during the course of appellant proceedings. No cross examination was allowed to the assessee and information was used against the assessee causing violation of natural justice. The FAA dismissed the appeal of the assessee ex parte for non attendance of the ld.AR. In the case of Lakhmani Mewal (supra) the Hon'ble Supreme Court has held as under :*

*“Section 147 of the Income-tax Act, 1961 [Corresponding to section 34(1) of Indian Income-tax Act, 1922] – Income escaping assessment – Illustrations – Assessment year 1958-59 – Whether reasons for formation of belief contemplated by section 147(a) for reopening of assessment must have rational connection with or relevant bearing on formation of belief, and rational connection postulates that there must be direct nexus or live link between material coming to Income-tax Officer's notice and formation of his belief that there has been escapement of assessee's income from assessment in particular year because of his failure to disclose fully and truly all material*

facts – Held, yes – Whether duty cast upon assessee is to make true and full disclosure of primary facts at time original assessment, and it is for Income-tax Officer to draw correct inference from primary facts – Held, yes – Whether if Income-tax Officer draws inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening assessment – Held, yes – ITO completed original assessment by allowing deduction of interest paid to certain creditors – Subsequently, he reopened assessment for reasons recorded in report submitted to Commissioner for and other three appeals obtaining sanction under section 147(a) that one creditors had confessed that he was doing only name lending and that other creditors were only name lenders – There was no material to show that confession made by said creditor related to loan to assessee and not to some one else and also that said confession related to period which was subject matter of assessment – There was also no material to show that other creditors were name lenders – Whether live link or close nexus which should be there between material before Income-tax Officer and belief which he was to form regarding escapement of income of assessee from assessment because of latter's failure or omission to disclose fully and truly all material facts was missing in case – Held, yes – Whether, thus, High court was not in error in holding that said material could not have led to formation of belief that income of assessee had assessment because of his failure or omission to disclose fully and truly all material facts – Held, yes.

*In the case of Smt. Sangmitra Bharali (upra) the Hon'ble Gauhati High-Court held as under : “*

I. Section 68, read with sections 45 and 54F, of the Income-tax Act, 1961 - Cash credits (Undisclosed income v. LTCG) - Assessment year 2001-02 - Assessee held shares of company BPAL just for a period over 12 months and declared s le value 25 times more than purchase price - Company BPAL was not found at given address nor were its directors traceable - Purchase was not made through banking channel nor purchase price was verifiable in any way - Whether it was simply a sort of modus operandi to convert undisclosed income into a long-term 'capital gain' claiming same to be exempted invoking section 54F - Held, yes [Para 44] [In favour of revenue] II. Section 68 of the Income-tax Act 1961 - Cash credits (Advance by purchaser) - Assessment year 2001-02 - One VHPL allegedly advanced assessee cash against booking of flat - Assessee proved that amount so received w s duly recorded in books of account of VHPL - Identity of VHPL was also established by filing its IT returns, balance sheets, etc. - Whether no addition could be made in hands of assessee - Held, yes [Para 59] [In favour of assessee] III. Section 68 of the Income-tax Act, 1961 - Cash credits (Advance by purchaser) - Purchaser of car advanced certain sum to assessee - Identity of purchaser and genuineness of transaction was established - Whether transaction could not be treated as bogus and impugned amount could not be treated as an undisclosed income of assessee - Held, yes [Para 64] [In favour of assessee]”

*In the case of Gangeshwari Metal (P)Ltd (supra), the Hon'ble Delhi High Court has held as under : “*

There are two types of cases, one in which the Assessing Officer carries out the exercise which is required in law and the other in which the Assessing Officer 'sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The present case falls in the latter category. Here the Assessing Officer, after noting the facts, merely rejected the same. [Para 9] • There was a clear lack of inquiry on the part of the Assessing Officer once the assessee had furnished all the relevant material. In such an eventuality no addition can be made under section 68. [Para 10] • In view of above, impugned order passed by the Tribunal was to be upheld. [Para 11]

*In the case of Varinder Rawley (supra), the Hon'ble Punjab and Hariyana High Court has held as under :*

“where the assessee shows that the entries regarding credit in a third party's account were in fact received from third party and are genuine, he discharges the onus. In that case, the sum cannot be

charged as the assessee's income in the absence of any material to indicate that it belongs to the assessee", particularly in a case where no summons u/s 131 is issued against the third party"

*In the case of Sachitel Communications P.Ltd (supra), the hon'ble Gujara High Court has held as under :*

"II. Section 68 of the Income-tax Act, 1961 - Cash credit (Loans) - Assessment year 2006-07 - Commissioner (Appeals) and Tribunal concurrently found that assessee proved identity of creditor and capacity to pay and that payment was made through banking channel - Whether no addition could be made on account of unsecured loan - Held, yes [Para 3] [In favour of assessee]"

*In the case of Patel Ramniklal Hirji, the Hon'ble Gujrat High Court has held as under :*

"The addition on the basis that four depositors furnished requisite details to prove their identity and showed the place of their residence. The loan was received through account payee cheques. Copies of Bank Statements was given and the details of PAN were available. All the materials duly proved the genuineness of the transaction of loan as well as creditworthiness of the depositors. Hence, the addition u/s. 68"

*In the case of Jaikumar Bakliwal (supra), the Hon'ble Rajasthan High Court has held as under:*

"Three things are required to be proved by recipient of money i.e (1) identity of the creditor (2) capacity of the creditor to advance money and (3) genuineness of the transaction. Held, dismissing the appeal, that all cash creditors were assessed to income-tax and they proved a confirmation as well as their permanent account number. They had their own respective bank accounts which they had been operating and it was not the claim of the Assessing Officer that the assessee was operating their bank accounts. Most of the cash creditors appeared before the Assessing Officer and their statements under Section 131 of the Income-tax Act, 1961, were also recorded on oath. There was no clinching evidence nor had the Assessing Officer been able to prove that the money actually belonged to none but the assessee. The addition of Rs.17,27,2501- under section 68 was not justified."

*In the case of Nemi Chand Kothari (supra), the Hon'ble High Court has held as under :*

"16. A person may have funds from any source and an assessee, on such information received, may take loan from such a person. It is not the business of the assessee to find out whether the source or sources from which the creditor had agreed to advance the amounts were genuine or not. If a creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the and other three appeals assessee to obtain such amount of money or part thereof from the creditor, by way of cheque in the form of loan and in such a case, if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep the same in the bank, the said amount cannot be treated as income of the assessee from undisclosed source. In other words, the genuineness as well as the creditworthiness of a creditor have to be adjudged vis-a-vis the transactions, which he has with the assessee. The reason why we have formed the opinion that it is not the business of the assessee to find out the actual source or sources from where the creditor has accumulated the amount, which he advances, as loan, to the assessee is that so far as an assessee is concerned, he has to prove the genuineness of the transaction and the creditworthiness of the creditor vis-a-vis the transactions, which had taken place between the assessee and the creditor and not between the creditor and the sub-creditors, for, it is not even required under the law for the assessee to try to find out as to what source or sources from where the creditor had received the amount, his special knowledge under section 106 of the Evidence Act may very well remain confined only to the transactions, which he had with the creditor and he may not know what transaction(s) had taken place between his creditor and the sub-creditor. No such additional burden can be placed on an assessee, which is not envisaged by section 106 of the the Evidence Act. The Revenue/Assessing Officer, however, remains free to show that the amount, which has come to the hands of the assessee by way of loan

from the creditor actually belonged to the assessee, but this conclusion cannot be reached by mere failure on the part of the sub-creditor to show his creditworthiness and/or the genuineness of the transaction between the creditor and sub-creditor, for, the creditor may receive any amount from sources known to the creditor only and if he fails to show how he has received the amount, in question, or if he fails to show the creditworthiness of his sub-creditor, such an amount may be treated as the income from undisclosed source of the creditor or of the sub-creditor, as the case may be, but such failure, on the part of the creditor cannot, in the absence of any clinching evidence, be treated as the income of the assessee derived from undisclosed source. :Held (i) that the assessee had established the identity of the creditors. The assessee had also shown, in accordance with the burden, which rested on him, under section 106 of the Evidence Act, that the said amounts had been received by him by way of cheques from the creditors which was not in dispute. Once the assessee had established these, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter, the burden had shifted and other three appeals to the Assessing Office to prove the contrary. The failure on the part of the creditors to show that their Sub-creditors had creditworthiness to advance the said loan amounts to the assessee, could not, under the law be treated as the income by the appellant from undisclosed sources merely on the failure of the sub-creditors to prove their creditworthiness from undisclosed sources of the assessee himself, when there was neither direct nor circumstantial evidence on record that the said loan amounts actually belonged to, or were owned by, the assessee. The Assessing Officer failed to show that the amounts, which had come to the hands of the creditors from the hands of the sub-creditors, had actually been received by the sub-creditors from the assessee. Therefore, the Assessing Officer could not have treated the said amounts as income derived by the assessee from undisclosed sources." (ii) that no assessment could be made contrary to the provisions of law. In the instant case, the very basis for making the assessment was under challenge. If the assessment was based on a completely erroneous view of law, such findings could not be regarded as mere findings of facts, but must be treated as substantial questions of law. Therefore, the question raised in the appeal was a substantial question of law because it went to the very root of the assessment made. The aforesaid view has been also considered and fortified and favourably referred to by the Allahabad High Court in the case of C.I.T. v. Shalimar Buildwell Pvt. Ltd. (2014) 220 Taxman 138 (All.)

*In the case of Lalpuria Construction P. Ltd (supra) the Hon. Rajasthan High Court has held t*

"that in the case of Accommodation entry - without giving an opportunity of cross examination merely on the basis of oral statement additions cannot be made u/s. 68. It is further held that: "The oral statement of a third party recorded by Search authorities which was never placed to be confronted by assessee and no documentary evidence was supplied to assessee, could not be considered in making addition u/s. 68 on account of alleged accommodation entries. " Besides, it is further submitted that the Hon'ble Bombay High Court in the case of Mls. Rushabh Enterprise v. ACIT had occasion to go through the identical issue and two of the Creditors in that case, i.e. Mls. Laxmi Trading Co. and Mls. Rose Impex were also parties in the case of the assessee.

*In the case of Andaman Timber Industries (supra), the Hon'ble Supreme Held as under .:*

"Not allowing the assessee to cross examine the witnesses by the Adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullify in as much as it amounted to violation of principles of Natural Justice because of which the assessee was adversely affected."

*The order was vacated. The aforesaid view was earlier considered by the Jurisdictional High Court in the case of CIT v. Ashish International.*

*In our considered view the facts of the assessee case are squarely covered by the ratio laid down in the decisions referred to above. We ,therefore , in view of our observations and the ratio laid down by*

*the various decisions are inclined to set aside the order of CIT(A) and direct he AO to delete the additions of Rs. 1,29,04,231/-. Since we have decided the issue of addition u/s 68 in favour of the assessee, the addition as sustained by the ld CIT(A) u/s 69C of the Act of Rs. 3,45,000/- is also ordered to be deleted. In result the appeal of the assessee is allowed.”*

We find that in the cases relied upon by the assessee i.e. Sanghavi Reality Pvt.Ltd.( supra), Vikram Muktilal Vora(supra),Gujarat Construction(supra),the order of the Reliance Corpora - tion(supra) has been followed.As the fact of the case under consideration are similar to above referred cases,so,following those orders,we decide seventh ground of appeal,raised by the assessee,in its favour.

**9.Remaining grounds are of consequential in nature,hence are not being adjudicated.**

In the result,appeal filed by the AO is rejected and the appeal of the assessee is partly allowed.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है और निर्धारिती की अपील अंशतः मंजूर की जाती है.

Order pronounced in the open court on 11<sup>th</sup> April,2018.

आदेश की घोषणा खुले न्यायालय में दिनांक 11<sup>th</sup> अप्रैल, 2018 को की गई ।

**Sd/-**

**Sd/-**

(संदीप गोसाईं /Sandeep Gosain)

(राजेन्द्र / RAJENDRA)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक/Dated : 11.04.2018.

Jv.Sr.PS.

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR “ D ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खडपीठ,आ.अ.न्याया.मुंबई
- 6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.