IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, MUMBAI
BEFORE HON’BLE SHRI R. C. SHARMA, AM &
HON’BLE SHRI SANDEEP GOSAIN, JM

आयकरअपीलसं./ I.T.A. No. 973/Mum/2017
(**निर्धारणवर्ष /** Assessment Year:2009-10)

ACIT- 9(2)(2) 6th floor Room no. 665A, Aayakar Bhavan, M.K. Road, Mumbai-400 020.	**बनाम**/ Vs.	M/s Ciron Drugs & Pharmaceuticals Pvt. Ltd., 6th floor, Alpha Apartmnets, M. G. Road, Vile Parle (East) Mumbai-400 057
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AABCC0873D		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकरअपीलसं./ I.T.A. No. 787/Mum/2017
(**निर्धारणवर्ष /** Assessment Year: 2009-10)

M/s Ciron Drugs & Pharmaceuticals Pvt. Ltd., 6th floor, Alpha Apartmnets, M. G. Road, Vile Parle (East) Mumbai-400 057	**बनाम**/ Vs.	ACIT- 9(2)(2) 2nd floor Room no. 204, Aayakar Bhavan, M.K. Road, Mumbai-400 020.
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)
अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Abi Rama Karthikiyen, DR
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri Ajay C. Gosalia, AR
सुनवाईकीतारीख/ **Date of Hearing**	:	04/10/2018
घोषणाकीतारीख / **Date of Pronouncement**	:	07/12/2018

आदेश / O R D E R

Per Sandeep Gosain, Judicial Member:

The present two appeals have been filed by the revenue as well as assessee are against the order of Commissioner of Income Tax (Appeals)-16, Mumbai dated 25.11.16 for AY 2009-10 respectively.

2. Since, the facts raised in both the appeals filed by the revenue and the assessee are identical, therefore for the sake of convenience; they are clubbed, heard and disposed of by this consolidated order.

3. First of all we take up appeal in **ITA No. 787/Mum/2017 filed by assessee for AY 2009-10** on the grounds mentioned herein below:-

> ***Ground No. 1 :-***
> ***Issue of notice u/s 148***
> *a) On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) erred in treating reopening appellant's assessment as valid assessment.*

b) On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) erred in treating reopening appellant's assessment as valid assessment on the ground that –

- *Maharashtra Sales Tax department has declared the impugned parties, mentioned in reasons forming belief, as hawala dealers and had cancelled their TINs.*

***Bogus Purchases** '.-*

a) On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) erred in making addition at estimated profit @ 12.5% of purchases made from bogus entities as the suppressed profit element embedded in such purchases.

b) On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) erred in making addition at estimated profit rate of 12.5% the basis of certain information received from Sales-tax Department. On the basis of this information the AO arrived at the conclusion that the above purchases are non-genuine or are bogus and learned CIT(A) has erred in confirming the same.

c) On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) erred in making conclusion on the basis of information received from sales tax department and not from making enquiry *from the assessee or verifying the genuineness of the transaction after verifying the details from the assesee. The learned AO failed to conduct independent enquiries and learned CIT(A) has erred in confirming the same.*

<u>Ground No. 2</u> :-

<u>Deduction u/s 801B</u>

a) On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) erred in not allowing deduction u/s 80IB.

b) In view of the Circular No. 37/2016, the Board has accepted the settled position that the disallowances made under sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Act and other specific disallowances, related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance. Hence in view of the above, during the appellate proceedings this ground was not pressed, a)On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) erred in considering Circular No. 37/2016.

<u>Note</u> :- The Appellant craves, leave to add to, amend, alter or withdraw any of the foregoing grounds of appeal before or at the time of hearing of the appeal, if necessary.

4. The brief facts of the case are that the return of income for the year under consideration was filed on 29.09.09 declaring total income of Rs. 75,69,450/- and revised its return of income on 14.11.10 declaring total income of Rs. 87,61,690/-. Subsequently the case was selected for scrutiny and after serving statutory notices and providing opportunity of hearing, assessment u/s 143(3) of the Act was completed on 09.05.2011 determining total income at Rs.92,86,416/- and book profit at Rs.3,20,35,106/- u/s 115JB. Thereafter, on the basis of information received from Sales Tax (VAT) Department, State of Maharashtra the case was re-opened u/s.147 of the I.T. Act, 1961 and an order u/s 143(3) r.w.s.147 of the Income tax Act, 1961 was passed on 19.03.2015 assessing the total income of the assessee at Rs.5,29,91,365/- *by* disallowing Rs.4,37,04,949/- as bogus purchases.

Aggrieved by the order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties *partly allowed* the appeal of the assessee.

Now before us, the revenue as well as assessee have preferred their respective appeals. Firstly we are dealing with the appeal filed by the assessee on the grounds mentioned above.

Ground No. 1 (a & b).

5. These grounds raised by the assessee are inter connected and inter related and relates to challenging the order of Ld. CIT(A) in treating reopening appellant's assessment as valid assessment on the ground that Maharashtra Sales Tax department has declared the impugned parties, mentioned in reasons forming belief, as 'Hawala Dealers' and had cancelled their TINs, therefore we thought it fit to dispose of the same by this common order.

6. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment cited by both the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the assesee in para no. 6.1 6.1 (6.1.1 to 6.1.2) of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 6.2 (6.2.28 to 6.2.31) of its order and the same is reproduced below:-

> *6.1 Ground No.l*
>
> *6.1.1 Vide this ground, the appellant has challenged the validity of notice issued u/s.148 of the I.T. Act by the A.O. The appellant filed its return of income for A.Y.2009-10 on 29.09.2009 declaring total income of Rs.75,69,450/- and revised its return of income on 14.112010 declaring total income of Rs.87,61,690/-. Assessment u/s 143(3) of the Act was completed on 09.052011 determining total income at Rs.92^6,416/-. Subsequently, the case was re-opened u/s.147 of the I.T.Act by issuing a notice u/s.148 of the I.T. Act dated 04.03.2014. Before issuing of notice u/s.148 me A.O. recorded proper reasons. The copy of the reasons recorded was filed by the appellant during the course of appellate proceedings. During appellate proceedings no specific arguments were made although written submissions were filed.*
>
> *6.1.2 The information was received regarding taking of bogus purchase entries from hawala dealer*

without actual delivery of materials from the sales tax department Reopening was based on tangible material which was provided after proper verification and inquiries by sales tax / VAT Department Govt of Maharashtra. From para 3 of the reasons recorded it is dear mat A.O. has considered the material received from sales tax / VAT department Govt of Maharashtra and after considering the information received from sales tax / VAT department A.O. made his belief regarding escapement of income. The Hon'ble Apex Court in the case of ITO Vs. Lakhmani Mewal Das (SQ103 ITR 437, Phool Chand Bajrang Lal & Another Vs. ITO & Anr.(SC) 203 ITR 456, Raymond Woollen Mills Vs. ITO (SC) 236 ITR 34 has held mat sufficiency of reason is not open to question in a court of law but the existence of belief can be challenged. In this case information was received from Government department and it was sufficient to make a belief regarding escapement of income. As mentioned in (he foregoing paragraphs, the A.O. made a belief regarding escapement of income before issuing notice u/s.148 of the LT Act. The Hon'ble Madras High Court in the case of Sterlite Industries Ltd. vs. A.CI.T. 302 ITR 275 has held that information received from Enforcement Directorate showing possible inflation of purchases is sufficient information for issuing notice u/s.148 of the LT. Act Similarly in AGR Investments

Ltd. vs. AddLCTT (Del) and Shalimar Buildcon (P) Ltd. Vs. ITO (TTAT Jaipur) 136 TTJ 701, the Hon'ble Delhi High Court and Hon'ble ITAT Jaipur has held that notice can be issued u/s 148 on the basis of information received from the Investigation Wing of Income tax Department. In the instant case, information was received from sales tax / VAT department which was also verified by the Investigation Wing of the department Therefore, facts of the appellant are covered by the judgment of Hon’ble Madras High Court in Sterlite Industries (I) Ltd. (supra) and Hon’ble Delhi Court in AGR Investment Ltd. (supra). In view of it, ground no. 1 is dismissed.

Ld. AR reiterated the same arguments as were raised by him before Ld. CIT(A). It was argued that Ld. CIT(A) erred in holding that reopening of assessment by DCIT was proper more particularly when he did not have with him on record, the statements of concerned persons of impugned parties. It was also submitted that there was no material on the record to show that assessee was beneficiary of hawala sales bills or material showing that assessee had made purchases from them after cancellation of TINs, but on the contrary, the AO had taken into consideration the material received from Sales Tax /VAT Department without applying his own mind. Therefore, issuance of notice u/s 148 of the I.T. Act was bad in law. It was further argued that the AO had not obtained sanction of JCIT as required u/s 151(2) of the Act.

On the contrary, Ld. DR relied upon the orders passed by Ld. CIT(A) and submitted that the AO had considered the information and material received from the Sales Tax Department and only after taking into consideration, the said facts, AO formed belief and recorded reasons and thus, the reopening was in accordance with law.

After having heard the counsels for both the parties at length and after considering the material placed on record as well as the orders passed by the revenue authorities, we notice from the record that the assessment u/s 143(3) of the Act was completed on 09.05.2011 determining total income at Rs.92,86,416/-. Subsequently, the case was re-opened on the basis of the information received regarding taking of bogus purchase entries from hawala dealer without actual delivery of materials from the sales tax department. Since that information was provided after proper verification and inquiries by sales tax / VAT Department, Govt of Maharashtra, therefore the same was rightly considered as 'tangible material'. From the 'reasons recorded' by the AO, it is clear that AO had considered the material received from sales tax / VAT department Govt of Maharashtra and after considering the information received from sales tax / VAT department A.O. made his belief regarding escapement of income. We have also considered the judgment of Hon'ble Apex Court in the case of **ITO Vs. Lakhmani Mewal Das (SQ103 ITR 437, Phool Chand Bajrang Lal & Another Vs. ITO & Anr.(SC) 203 ITR 456, Raymond Woollen Mills Vs. ITO (SC) 236 ITR 34** *wherein it was categorically held that sufficiency of reason is not open to question in a court of law but the existence of belief can be challenged.*

As per the facts of the present case, the information was received by the AO from the Government department and it was sufficient to make a belief regarding escapement of income as the presumption of correctness is attached to it. We have also considered the judgment of Hon'ble Madras High Court in the case of **Sterlite Industries Ltd. vs. A.CI.T. 302 ITR 275** *wherein it was held that information received from Enforcement Directorate showing possible inflation of purchases is sufficient information for issuing notice u/s.148 of the LT. Act.* Similarly in **AGR Investments Ltd. vs. AddLCTT (Del) and Shalimar Buildcon (P) Ltd. Vs. ITO (TTAT Jaipur) 136 TTJ 701**, the Hon'ble Delhi High Court and Hon'ble ITAT Jaipur *had held that notice can be issued u/s 148 on the basis of information received from the Investigation Wing of Income tax Department. In the instant case, information was received from sales tax / VAT department which was also verified by the Investigation Wing of the department.*

Therefore considering the facts of the present case, we found that the assessee’s case is covered by the judgment of Hon’ble Madras High Court in **Sterlite Industries (I) Ltd. (supra**) and Hon’ble Delhi Court in **AGR Investment Ltd. (supra).**

Moreover, no new facts or contrary judgments have been brought on record in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings so recorded by the Ld.CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, these grounds raised by the assessee stands **dismissed**.

Ground No. 1 (a) to (c) (Bogus purchases).

7. These grounds raised by the assessee are inter connected and inter related and relates to challenging the order of Ld. CIT(A) in making addition at estimated profit @ 12.5% of purchases made from bogus entities by considering the suppressed profit element embedded in such purchases, therefore we thought it fit to dispose of the same by this common order.

8. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment cited by both the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the assesee in para no. 6.2 (6.2.1 to 6.2.31) of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 6.2 (6.2.28 to 6.2.31) of its order and the same is reproduced below:-

> *6.2.28 The facts in the present case are similar to the facts in the above mentioned case. In the present case, the Ld, AQ has shown that the party in question was nonexistent The appellant has not been able to disprove the findings of the Ld. AO regarding the non-existence of the party. However, Ld. AO after examining the evidences did not give any adverse finding that the appellant had not shown consumption/sales of the goods and that it had not offered the income on such sale of goods. In this case, Ld. A.O. not having doubted the genuineness of sales could not have gone ahead and made addition in respect of the entire purchases as it would lead to absurd profits. Thus, the issue would boil down to finding out the dement of suppressed profit embedded in purchases which the appellant would have made from some unknown or bogus entities. Hence, following the decision of the Hon'ble Gujarat High Court in Bholanath Polyfatu Pvi Ltd. (supra), the*

estimated suppfessed profit margin embedded in such amounts of purchases could only be disallowed and subjected to tax.

6.2.29 Similarly, in yet another decision of Hon'ble Gujarat High Court in the case of CIT vs. Sitnit Sheth (2013) 38 Taxmann.com 385 (Guj), Hon'ble Court was seized with a similar issue where the A.O. had found that some of the alleged suppliers of steel to the assessee had not supplied any goods but had only provided sale bills and hence, purchases from the said parties were held to be bogus. The A.O. in that case added the entire amount of purchases to gross profit of the assessee. Ld. OT(A) having found that the assessee had indeed purchased though not from named parties but other parties from grey market partially sustained the addition as probable profit of the assessee. The Tribunal however, partly sustained the addition. Taking into account the above facts, the Hon'ble Gujarat High Court held that since the purchases were not bogus, but were made from parties other than those mentioned in books of accounts, only the profit element embedded in such purchases could be added to the assessee's income and as such no question of law arose in such estimation. While arriving at the above conclusion, the Hon'ble Court also relied on the decision in the case of Vijay M. Mistry Construction Ltd. 355 ITR 498 (Guj) and further approved the *decision of Ahmedabad Bench, IITAT in the case of Vijay Proteins 58ITD 428.*

6.2.30 In the case of Vijay Proteins (supra), the Hon'ble HAT was seized with a case of bogus; suppliers of oil cakes where 33 parties were found to be bogus by the departmental authorities even though payments were made to the said parties by cross cheques and in fact the A.O. in that case had brought adequate material on record to prove that the cross cheques had not been given to parties from whom supplies were allegedly procured but these were encashed from a bank account in the name of another entity, possibly hawala dealer. Subsequently, the money deposited in mat account was withdrawn in cash almost on the same day. The Tribunal however/ held that if the purchases were made from open market without insisting for genuine bills, the suppliers may be willing to sell the product at a .much less rate as compared to a rate which they may charge in which the dealer has to give genuine sale invoice in respect of that sale. Keeping all such factors in mind, the Tribunal estimated an element of profit percentage of the overall purchase price accounted for in the books of accounts through fictitious invoices.

6.2.31 As narrated earlier, the Ld. A.O. in this case has held that the parties from whom the purchases *were made by the appellant were found to be bogus and mat is the reason for which it was not produced during the assessment proceedings. Not having doubted the consumption/sales, the motive behind obtaining bogus bills thus, appears to be inflation of purchase price so as to suppress true profits. Considering the facts of the case as well as the various case laws cited (supra), I estimate the suppressed profit to the extent of 12.5% of the purchases made from the bogus entities, as the suppressed profit element embedded in such purchases. This estimation is in addition to the GP shown by the appellant Accordingly, this ground of appeal is partly allowed.*

Ld. AR reiterated the same arguments as were raised before Ld. CIT(A). It was argued that Ld. CIT(A) erred in making addition at estimated profit @ 12.5% of purchases made from bogus entities as the suppressed profit element embedded in such purchases. It was also submitted that Ld. CIT(A) erred in making addition at estimated profit rate of 12.5% the basis of certain information received from Sales-tax Department. It was submitted that only on the basis of this information the AO arrived at the conclusion that the above purchases are non-genuine or are bogus, whereas no independent evidence was placed on record by the AO and the additions were made only on the basis of information received from sales tax department and not from making enquiry from the assessee or verifying the genuineness of the transaction after verifying the details from the assessee and thus requested for deleting the additions.

On the other hand Ld. DR submitted that they have also filed their appeal against the order of Ld. CIT(A) as, according to the facts of the present case, the order of AO should have been upheld. It was also submitted that it was the onus of the assessee to prove the transactions, but they have miserably failed to discharge its onus and also failed to furnish the supporting documentary evidence to support that purchases were actually made by them.

After having heard the counsels for both the parties at length and after considering the material placed on record as well as the orders passed by the revenue authorities, we notice from the record that the AO made the additions on the basis of information received from the Sales Tax Department (VAT), Govt. of Maharashtra. The assessee was given opportunity to prove the genuineness of purchases by leading supportive evidence and by producing the parties for verification about the genuineness of the purchases. Although, the assessee had placed on record number of documents including the evidence regarding transportation and consumption of material, but it was admitted by the assessee that they were not in a position to produce the parties for verification about the genuineness of the purchases. We have also considered the judgments recorded in the order of Ld. CIT(A) and also cited by the parties.

Though the AO categorically recorded that the party in question was nonexistent and the assessee had also not been able to disprove the findings of the AO regarding the non-existence of the party. However, AO had not given any adverse finding that the assessee had not shown consumption/sales of the goods and that it had not offered the income on such sale of goods. Hence in such circumstances, when the AO had not doubted the genuineness of sales, then the AO could not have made addition in respect of the entire purchases. Therefore, considering all those facts and while keeping into consideration, the judgment of Hon'ble Gujarat High Court in **Bholanath Polyfatu Pvi Ltd.**

(supra), CIT vs. Sitnit Sheth (2013) 38 Taxmann.com 385 (Guj), Vijay Proteins (supra), had correctly estimated the suppressed profit to the extent of 12.5% of the purchases made from the bogus entities, as the suppressed profit element embedded in such purchases and correctly held that this estimation is in addition to the GP shown by the assessee.

Moreover, no new facts have been brought on record in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings so recorded by the Ld.CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, these grounds raised by the assessee stands **dismissed**.

Ground No. 2 (a & b)

9. These grounds raised by the assessee are inter connected and inter related and relates to challenging the order of Ld. CIT(A) in not allowing deduction u/s 80IB, therefore we thought it fit to dispose of the same by this common order.

10. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment cited by both the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the assesee in para no. 6.3 of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 6.3.1 of its order and the same is reproduced below:-

> ***6.3 Ground No 3:***
>
> *6.3.1 Vide this ground, the appellant has agitated against non-granting of deduction u/s 80IB. Appellant stated mat the appellant company had set up a new industrial undertaking m a backward district in the previous year relevant to A.Y.2003-04 and had fulfilled all conditions mentioned in S.80IB and hence it has been regularly allowed deduction mere under since that assessment year. During appellate proceeding this ground was not pressed. Hence, this ground is dismissed.*

Since this ground was not pressed by the assessee before Ld. CIT(A), hence the same rightly dismissed. In the absence any evidence, now the assessee cannot be allowed to raise the said ground again when the same was not pressed before Ld. CIT(A).

Moreover, no specific arguments were raised by the assessee on this ground. Hence we see no reasons to interfere into or deviate from the findings so recorded by the Ld. CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, these grounds raised by the assessee stands **dismissed**.

Now we take up ITA No. 973/Mum/2017 filed by revenue.

11. Since we have already decided the appeal filed by assessee in ITA No. 787/Mum/2017 for AY 2009-10 on merits and upheld the order of estimation @ 12.5 %. Therefore following our own decision in ITA No. 787/Mum/2017, we apply the same findings

in the present appeal in order to maintain judicial consistency which is applicable mutatis mutandis in the present case.

12. In the net result, both the appeals filed by the assessee and revenue stands **dismissed.**

Order pronounced in the open court on 7th Dec, 2018

Sd/- Sd/-
(R. C. Sharma) (Sandeep Gosain)
लेखासदस्य / Accountant Member न्यायिकसदस्य / Judicial Member
मुंबई Mumbai;दिनांकDated : 07.12.2018
Sr.PS. *Dhananjay*

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार
(Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**