

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**TAX APPEAL NO. 701 of 2015**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MS.JUSTICE HARSHA DEVANI**

and

**HONOURABLE MR.JUSTICE G.R.UDHWANI**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

YUNUS HAJI IBRAHIM FAZALWALA....Appellant(s)

Versus

INCOME TAX OFFICER....Opponent(s)

Appearance:

MR JP SHAH, ADVOCATE for MR MANISH J SHAH, ADVOCATE for the Appellant(s) No. 1

MR SUDHIR M MEHTA, ADVOCATE for the Opponent(s) No. 1

**CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI**  
and  
**HONOURABLE MR.JUSTICE G.R.UDHWANI**

**Date : 16/02/2016**

**ORAL JUDGMENT**

**(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)**

1. Heard Mr. J. P. Shah, learned counsel for the appellant.
2. ADMIT. The following substantial question of law arises for consideration :-

“Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that purchases of Rs.73,29,278/-, out of the total purchases of Rs.1,01,83,331/- of grey cloth was bogus and, therefore, 25% thereof was required to be disallowed and added as income of the appellant ?”

3. Having regard to the controversy in issue which lies in a very narrow compass and with the consent of the learned counsel for the respective parties, the appeal was taken up for final hearing.

4. The appellant assessee is the proprietor of M/s. Ladly Prints which is engaged in the business of purchase and sale of grey cloth. The appellant filed return of income for assessment year 2003-04 on 21.10.2003 declaring total income of Rs.1,09,218/-. The original assessment came to be completed under section 143(3) of the Act on 10.3.2006 whereby the Assessing Officer disallowed 25% of the purchases of Rs.73,29,278/-, that is, Rs.18,32,319/-, claimed to have been

made by the assessee as bogus purchases and added the same to the income of the assessee.

5. The assessee carried the matter in appeal before the Commissioner (Appeals), who confirmed the disallowance. The assessee carried the matter in further appeal before the Income Tax Appellate Tribunal, which, by an order dated 5.9.2008 restored the issue to the file of the Assessing Officer to decide the matter in terms of the Tribunal's previous order in the case of the assessee relating to assessment year 2001-02, wherein the following observations were made :-

*"We have carefully considered the arguments of both the sides and perused the material placed before us. We find that the assessee in his written submissions before the AO has mentioned that the assessee has maintained day to day quantitative register in which such purchases are recorded. He has also mentioned that same goods are sold by the assessee and therefore, if the purchases are held to be bogus, how the goods be sold by the assessee. We find that though the AO has reproduced the above submissions of the assessee in the assessment order, however, he has not given any comment whether the above submissions of the assessee were factually correct or not. He has made the addition on the ground that the assessee was unable to produce the seller and that the cheques were encashed by somebody else. In our opinion, the above two facts raise serious doubt about the genuineness of the purchases but the same cannot be said to be conclusive. If the seller has given the cheque to somebody else for discharge of their liability and the other party has encashed the cheque, it could not be said that the purchase by the assessee is bogus. Therefore, it is very relevant to ascertain who encashed the cheque. If the cheque is encashed by somebody else on behalf of the seller, then, the purchases would be genuine. But if the cheque is encashed by or on behalf of the assessee, then, obviously the purchases would be bogus. Similarly, the actual receipt of goods is very important for determining the genuineness of the*

*purchases. If the assessee has maintained day-to-day stock register of the goods and the goods in such register are recorded and the correctness or genuineness of the stock register is not doubted, then, obviously it would be improper to doubt the genuineness of the purchases itself. If the goods are received and the seller is not found at the address given, then, at the most doubt can be raised about the rate at which goods were purchased. However, all these facts need verification at the end of the A.O. We, therefore, set aside the orders of the authorities below and restore the matter back to the file of the AO. We direct him to re-examine the whole issue afresh as per our observations above and thereafter re-adjudicate the matter in accordance with law. Needless to mention that the AO will allow adequate opportunity of being heard to the assessee."*

6. The Assessing Officer by an order dated 30.12.2009 came to the conclusion that the purchases made by the assessee during the year under consideration were not genuine. He, accordingly, disallowed 25% of the purchases of Rs.73,29,278/- to the tune of Rs.18,32,319/- and added the same back to the total income of the assessee. The assessee carried the matter in appeal before the Commissioner (Appeals), who did not agree with the Assessing Officer and held thus:-

**"6. DECISION:**

*I have considered the assessment order and the submission of the appellant as enumerated above. I do not agree with the A.O.'s action as far as the above addition is concerned due to the following reasons:*

*i. The mandatory requirement for payment of expenditure by an account payee cheque drawn on a bank or account payee bank draft in Section 40A(3) of the I.T.Act has come w.e.f. 13.7.2006 whereas the appellant's case pertains to A.Y. 2003-04.*

*ii. The A.O. has not found any defect in the*

*books of account including the day to day stock register maintained by the appellant. It means purchases and sales are genuine.*

*iii. The A.O. had not found any instance where the cheques issued by the appellant has been encashed on behalf of the appellant, for coming to the conclusion that purchases are bogus (as per observation of ITAT).*

*iv. In the assessee's own case for A.Y. 2001-2002 and other related case i.e. Smt. A. Haji Ibrahim Fazalwala for A.Y. 2001-02 no addition was made on the same issue (payment of expenditure by cheques) although similar facts and circumstances were there. This was done by the A.O. following similar directions given by Hon'ble ITAT, Ahmedabad.*

*Therefore, considering the above facts and circumstances of the case, the addition made on this account is hereby deleted and this ground of appeal is allowed."*

The revenue carried the matter in appeal before the Tribunal, which set aside the order passed by the Commissioner (Appeals) and restored the order passed by the Assessing Officer.

7. Mr. J. P. Shah, learned counsel for the appellant invited the attention of the court to the order passed by the Tribunal in the previous round of litigation, to point out the nature of the directions that came to be issued by the Tribunal. It was submitted that the findings recorded by the Commissioner (Appeals) were in consonance with the directions issued by the Tribunal in the previous order, whereas the Tribunal had failed to appreciate the evidence on record in proper perspective while setting aside the order passed by the Commissioner (Appeals). The attention of the court was invited to various

infirmities in the order passed by the Tribunal, to submit that the Tribunal has proceeded on a misconception of facts which would render the findings of the Tribunal perverse. Referring to the findings recorded by the Assessing Officer, it was submitted that one of the grounds for holding against the appellant is that the appellant had issued crossed cheques instead of account payee cheques. It was submitted that at the relevant time, there was no mandatory requirement for payment of expenditure by an account payee cheque or account payee draft as contemplated under section 40A(3) of the Act, which was brought into force with effect from 13.7.2006, inasmuch as the present case relates to assessment year 2003-04. It was, accordingly, urged that the impugned order passed by the Tribunal being perverse to the record of the case, deserves to be set aside and the order passed by the Commissioner (Appeals) is required to be restored.

8. Opposing the appeal, Mr. Sudhir Mehta, learned senior standing counsel for the respondent revenue, invited the attention of the court to the findings recorded by the Tribunal. It was submitted that the assessee in the present case had failed to produce the seller and that the cheques in question were encashed by somebody else, which raises serious doubt about the genuineness of the purchases made by the assessee. It was submitted that the Tribunal has rightly held that it was for the assessee to name the party from whom the purchases were made, the amount paid and the cheque number. That the assessee having failed to do so, the Assessing Officer had rightly held that the assessee has not proved the genuineness of the purchases and that the Tribunal

was wholly justified in confirming the order passed by the Assessing Officer.

9. The facts are not in dispute. In the first round of the proceedings, the Assessing Officer had disallowed 25% of the purchases of Rs.73,29,278/- amounting to Rs.18,32,319/- on the ground that the assessee had made bogus purchases. The matter travelled upto the Tribunal, which restored the matter to the file of the Assessing Officer with certain directions and guidelines as reproduced hereinabove. From the directions issued by the Tribunal vide its order dated 5.9.2008, it is evident that for the purposes of ascertaining the genuineness of the purchases, the Assessing Officer had been called upon to ascertain the following: firstly, as to whether the seller had given the cheque to somebody else for discharge of their liability and the other party has encashed the cheque, in which case, it cannot be said that the purchases by the assessee are bogus. Therefore, it is very relevant to ascertain who encashed the cheque. Secondly, if the cheque is encashed by somebody else on behalf of the seller, then, the purchases would be genuine. But if the cheque is encashed by or on behalf of the assessee, then, the purchases would be bogus. Thirdly, the actual receipt of goods is very important for determining the genuineness of the purchases. If the assessee has maintained day-to-day stock register of the goods and the goods in such register are recorded and the correctness or genuineness of the stock register is not doubted, then, it would be improper to doubt the genuineness of the purchases itself. Lastly, if the goods are received and the seller is not found at the address given, then, at the most doubt can be raised about the rate at which goods were purchased.

10. Thus, the Assessing Officer was required to make inquiry in the aforesaid manner. In this regard, a perusal of the order passed by the Assessing Officer reveals that he has not rejected the books of account and has accepted the same. The Assessing Officer prepared a chart showing the name of the party in whose favour the cheque was issued, the amount, the date when the cheque came to be issued, the cheque number and to whom the cheque had been endorsed and held that in view of the chart it was clear that the assessee had issued cross/bearer cheques and some of the cheques are endorsed to other parties which reveals that the seller has not encashed/deposited the said amounts in his account. He, accordingly, called upon the assessee to show cause why the purchase should not be treated as bogus and 25% thereof should not be disallowed. The assessee, in its reply stated that the serial numbers enumerated in the reply are written twice over by mistake. As regard certain other serial numbers mentioned in the reply, the Assessing Officer has mentioned in the column endorsed to "cash" which is not correct. The correct fact mentioned in the bank statement is "ICLG" which means "inward clearing". A copy of the bank statement was enclosed therewith. It was further stated that serial No.146 and 147 show that he had withdrawn cash from the bank account for his business expenses, while serial No.5, Rs.50,140/- and serial No.6, Rs.52,451/- cash payment made towards purchases totalling to Rs.1,02,591/-, out of which 20% of such amount of Rs.20,518/- can be disallowed. The Assessing Officer after considering the reply filed by the assessee has observed that the assessee has issued cross cheques instead of account payee cheques. Some of the cheques are endorsed by the

seller to other parties. Some of the cheques appear to have been routed through other proprietary concern of the assessee; for instance, the cheque issued in favour of M/s. A. K. Textiles was withdrawn by the proprietor named "Aaisha", vide cheque No.446893 dated 3.6.2002 drawn on Central Bank of Surat. In the same pattern, the other cheque dated 4.6.2002, bearing No.446894 in the name of A.K. Textile in which proprietor's name was shown as Mr. Feroz. The same pattern was repeated by the assessee when it had withdrawn Rs.50,027/- vide cheque No.446892 issued in favour of Anukul Textile. The Assessing Officer disbelieved that the proprietor had utilised his account through A.K. Textile. He further noted that in the same pattern the assessee had withdrawn an amount of Rs.50,027/- vide cheque No.446892 issued in favour of Anukul Textile and the same was withdrawn by him on the same day vide token 3549. The Assessing Officer noted that the above cheques were in serial numbers, viz., 446892, 446893, 446894 and cheque No.446895 issued in the name of the Tex Trade was withdrawn by the assessee for an amount of Rs.51,755/- and cheque No.446869 was issued in favour of self. However, on deeper scrutiny it was found that the same amount of Rs.20,000/- was credited in the name of M/s Palak Fashion in the books of the assessee. The Assessing Officer has further recorded that the assessee has maintained quantity register, however, he could not produce details of purchases and therefore, quantity of purchases could not be ascertained. He, accordingly, concluded that the purchases made by the assessee during the year under consideration cannot be said to be genuine. However, despite the fact that it is the case of the Assessing Officer that the purchases made by the assessee are not genuine, he has not rejected the books

of account and has accepted the same. The Assessing Officer has not doubted the purchases but has doubted as to whether the payments have in fact been made to the seller. On these findings, the Assessing Officer has disallowed 25% of the purchases of Rs.73,29,278/-.

11. The Commissioner (Appeals) has found that insofar as the observations of the Assessing Officer that payments have been made by account payee cheques are concerned, the same were not relevant to the assessment year under consideration as the mandatory requirement for payment of expenditure by an account payee cheque drawn on a bank or account payee draft in section 40A(3) of the Act has come into force with effect from 13.07.2006 whereas the assessee's case pertains to assessment year 2003-04. No defect was found in the books of account including the day-to-day stock register maintained by the assessee, which means that the purchases and sales are genuine; that the Assessing Officer has not found any instances where the cheques issued by the assessee has been encashed on behalf of the assessee for the purpose of coming to the conclusion that the purchases are bogus.

12. The Tribunal, however, in the impugned order has observed that the question is not of quantitative details because the Assessing Officer is also recognising the purchases made by the assessee. The question is that the assessee had produced purchase bills from a concern, namely, 'A' to procure the goods from another concern, namely, 'B'. How to verify the genuineness of the payments and the goods procured by him? In the opinion of this court, the aforesaid finding of the Tribunal is totally contrary to the record of the

case, inasmuch as, it is not even the case of the Assessing Officer that the assessee has produced purchase bills from one concern and procured the goods from another concern. In fact, it is the case of the Assessing Officer that the assessee has not produced the bills of purchases. The Tribunal after referring to the observations made in its previous order has observed that it was for the assessee to compile the details in a tabular form exhibiting the names of the parties from whom the purchases were made, the amount paid and the cheque number, whereas the assessee has failed to do so. How that amount was ultimately credited to that party is to be established by the assessee. The Tribunal further observed that for the sake of example, the first narration made by the Assessing Officer in paragraph No.4 of his order is Anamika Fabrics. A payment of Rs.45,470/- vide cheque no.563305 dated 2.12.2002 was made, which cheque, according to the Assessing Officer was endorsed to Faizan Texturing Unit. Now it is for the assessee to demonstrate that M/s Anamika Fabrics has received payment by crediting the amount of Faizan Texturing Unit. The link between Anamika Fabrics and Faizan Texturing Unit as to whether Faizan Texturing Unit has supplied goods to the assessee on behalf of Anamika Fabrics or M/s Anamika Fabrics directed the assessee to endorse the cheque to Faizan Texturing Unit is not ascertainable. It is also not ascertainable as to whether Faizan Texturing Unit is a representative of the assessee. The Tribunal, accordingly, held that the assessee miserably failed to establish a reconciliation between the payments made by him towards purchases vis-à-vis the ultimate recipient of the amounts being his vendor. In this regard, on a perusal of the assessment order, it is evident that all the details with regard to the various parties from whom the

assessee had purchased the raw materials, their names, the cheques and the amount in respect of which the cheques were issued are clearly provided in a tabular form as reflected in paragraph 4 of the said order. The observation as to whether Faizan Texturing Unit has supplied goods to the assessee on behalf of Anamika Fabrics or M/s Anamika Fabrics directed the assessee to endorse the cheque to Faizan Texturing Unit clearly reflects the ignorance on the part of the Tribunal about the provisions of the Negotiable Instruments Act, inasmuch as, a crossed cheque could be endorsed by the holder in due course to any party. If the assessee has issued a crossed cheque in favour of Anamika Fabrics which, in turn, has endorsed the same to Faizan Texturing Unit that does not imply that it is Faizan Texturing Unit which is the ultimate seller. It is the case of the assessee that it has purchased the goods from the parties in whose favour the cheques have been issued. If the seller party thereafter endorses the cheque in favour of some other party, it is not for the assessee to explain as to how and why the seller has endorsed such cheque in favour of such party. Besides, in terms of the directions issued by the Tribunal in the previous round, it was for the Assessing Officer to verify from the party in whose favour the cheque was endorsed to find out as to whether the amount had been withdrawn on behalf of the assessee or on behalf of the purchaser. This was the nature of exercise which was required to be carried out by the Assessing Officer. Clearly, therefore the Tribunal has proceeded on an erroneous footing contrary to the directions issued in its previous order.

13. Referring to the observations made by the Commissioner (Appeals) to the effect that the Assessing Officer has not found

any instance whether the cheque issued by the assessee has been encashed on behalf of the assessee, the Tribunal has expressed the view that it was for the assessee to establish how the payment was made to the ultimate seller of the goods. At the cost of reiteration it may be stated that it is not the case of the assessee that the party to whom the seller endorsed the cheque was the ultimate seller. The assessee had made payment towards the purchases by way of crossed cheque to the seller, who may have endorsed the same to any other party with whom he had transactions. However, in the absence of any finding recorded by the Assessing Officer that the cheque was ultimately encashed by or on behalf of the assessee, there was no reason to doubt the transactions. In paragraph 6 of the impugned order the Tribunal has observed that the Assessing Officer did not dispute the sales made by the assessee nor did he dispute the stock available with the assessee. The only dispute is as regards the rate at which the assessee had purchased the raw material. However, from the findings recorded by the Assessing Officer as well as by the Tribunal there is nothing to indicate that the Assessing Officer has entered into any inquiry as regards the rate of the raw material purchased by the assessee. In fact the Assessing Officer in the assessment order has held that it cannot be concluded that the purchases made by the assessee during the year under consideration are genuine and has disallowed 25% of the purchases and made an addition of Rs.18,32,319/-. Thus, the Assessing Officer without rejecting the books of account of the assessee for the year under consideration has observed that the genuineness of the purchases is not established and has made the addition whereas the Tribunal has proceeded on the footing that the Assessing Officer has

recognised the purchases made by the assessee and the question is not of quantitative details. The Tribunal has also observed that the Assessing Officer has accepted the sales made by the assessee and if that be so, it would indicate that the assessee must have made purchases, otherwise it would not be possible for the assessee to make the sales. Thus, even as regards the basic facts, the Tribunal has proceeded on an erroneous footing.

14. As regards the cheque issued in favour of A.K. Textile which is withdrawn by the proprietor of A.K. Textile named "Aisha" vide cheque No.446893 dated 03.06.2002 and cheque No.446894 dated 04.06.2002 in the name of A.K. Textile in which the proprietor's name is shown as Mr. Feroz, a perusal of the table at paragraph 4 of the assessment order shows that an amount of Rs.50140/- has been withdrawn in cash in respect of cheque No.446893 and an amount of Rs.52451/- has been withdrawn in cash in respect of cheque No.446894 and the assessee in his reply has clearly admitted that payment was made in cash and has stated that 20% thereof be disallowed. However, the same has been totally disregarded by the Assessing Officer as well as the Tribunal.

15. In the light of the above discussion, the court is of the view that the Tribunal while passing the impugned order has lost sight of the directions contained in its previous order and has recorded findings which are not in consonance with the record of the case and are, therefore, perverse. The impugned order of the Tribunal which suffers from various infirmities as noted hereinabove, therefore, cannot be sustained.

16. The appeal, therefore, succeeds and is, accordingly, allowed. The question is answered in the negative, that is, in favour of the appellant and against the revenue. The impugned order dated 17.7.2015 passed by the Tribunal in ITA No.782/Ahd/2011 is hereby quashed and set aside and the order passed by the Commissioner (Appeals) is hereby restored.

(HARSHA DEVANI, J.)

(G.R.UDHWANI, J.)

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