

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No.646/MUM/2016
Assessment Year: 2007-08**

ITO-32(1)(2),
Room No.- 204, C-11, 2nd
floor, Pratyakshakar
Bhavan, BKC, Bandra (E),
Mumbai-400051

(Appellant)

Vs.

Ashok V. Viradia
B-202, Building No.7, Prem
Nagar, Mandpeshwar
Road, Boriveli (W),
Mumbai-400092

(Respondent)

PAN No. AAIPV3260B

Revenue by: Shri Suman Kumar, DR
Assessee by: None

Date of Hearing : 04/07/2017
Date of pronouncement: 25/09/2017

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the Revenue. The relevant assessment year is 2007-08. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-44, Mumbai and arises out of the assessment completed u/s 143(3) r.w.s 147 of the Income Tax Act 1961, (the 'Act').

2. The ground raised by the Revenue in this appeal is against the estimation made by the Ld. CIT(A) @ 7.86% of the unexplained

expenditure of Rs.61,36,358/-. The AO has made the addition of Rs.61,36,358/- u/s 69C on account of bogus purchases.

3. Briefly stated, the facts of the case are that the Department conducted a search and seizure action u/s 132 on 03.10.2013 in Shri Rajendra Jain Group. As a result of search, it was known that the said Group was providing accommodation entries like bogus purchase, sale, unsecured loan, share capital etc. The Assessing Officer (AO) received information from the Director General of Income Tax (Inv.), Mumbai that the present assessee was also one of the beneficiaries who obtained accommodation entries of Rs.61,36,358/- through Vitrag, one the group concerns of Shri Rajendra Jain Group during the FY 2006-07 relevant to the impugned assessment year. After recording the reasons, the AO reopened the assessment by issuing notice u/s 148. Then the AO issued notice u/s 133(6) to M/s Vitrag Jewels, 803 Shrinathji Apartment, Hatfaliya, Haripura, Surat - 395003. In turn, M/s Vitrag Jewels, vide letter dated 21.01.2015 submitted copy of ledger account of M/s Vir Songs in M/s Vitrag Jewels' books of account for the period 2006-07 along with confirmation and bank statement as evidence to confirm the transaction of sale of rough diamonds to the assessee. In the ledger account it had disclosed sale of rough diamond valued at Rs.61,36,358/- alongwith VAT of Rs.61,364/- totalling to Rs.61,97,722/- to M/s Vir Sons. Then, the AO took into account the statement given by Shri Rejendra Jain during the course of search and seizure action u/s 132 on 03.10.2013 and arrived at a finding that Shri Jain directly or indirectly controlled various business concerns such as M/s Vitrag Jewels, Prop.

Shri Mudit P. Karnawat (*Ex-employee*). Taking into account the above facts, the AO asked the assessee to produce Shri Karnawat for examination to prove the genuineness of transaction. The assessee failed to produce Shri Karnawat. The AO came to a finding that since the party is now assessee's witness, he ought to have produced Shri Karnawat. But he failed to do so. As the genuineness of transaction was not proved, the AO made an addition of Rs.61,36,358/- u/s 69C as unexplained expenditure.

4. Aggrieved by the order of the AO, assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A) came to a conclusion that the profit element on the total component in dispute needs to be added to the income of the assessee. The Ld. CIT(A) estimated the gross profit shown by the assessee i.e. @ 7.86% on Rs.61,36,358/- which comes to Rs.4,82,318/-. Thus he restricted the disallowance to Rs.4,82,318/- in place of Rs.61,36,358/- made by the AO.

5. Before us, the Ld. DR submits that the Ld. CIT(A) has forgotten to take into account the statement given by Shri Rajendra Jain during the course of search and seizure action u/s 132 on 03.10.2013. He also submits that it was the duty of the assessee to produce Shri Karnawat. As the assessee failed to produce Shri Karnawat before the AO for examination, the Ld. DR submits that the onus cast on him was not discharged. Thus he submits that the addition made by the AO be confirmed.

None appeared on behalf of the assessee.

6. We have heard the Ld. DR and perused the relevant materials on record. The reasons for our decision are given below.

We may refer to the following relevant paragraphs of the statement recorded by the DDIT (Inv.), Unit-II (4), Mumbai of Shri Rajendra Kumar Jain :

“Q.13 Please furnish details of all the business concerns which are directly or indirectly controlled by you alongwith Shri Surendra Jain.

Ans. Sir, we are operating through a no. of business concerns of all the three nature i.e. proprietorship firm, partnership firm as well as companies in the name of various persons including our employees. But for all practical purposes, myself and Shri Surendra Jain are handling the entire business network on profit sharing basis. The name wise detail of all business concern of ours is as follows: -

| <u>Proprietorship firm</u> | <u>Name of Proprietor</u> |
|-----------------------------------|---|
| a. AVI Exports | Rajendra S Jain (myself) |
| b. Kalash enterprises | Manish Jain |
| c. AadiImpex | Anoop Jain |
| d. Arihant Exports | Sachin Pareek |
| e. Vitrag Jewels | Mudit Karnawat (Ex-employee) |
| f. Super Jewels | Ashok Jain (Ex-employee) |
| <u>Partnership firm</u> | <u>Name of Partners</u> |
| a. Sun Diam | Rajendra S Jain (myself)&Manish Jain |
| <u>Companies</u> | <u>Name of Directors</u> |
| a. KriyaImpex Pvt. Ltd | Rajendra S Jain (myself) & Manish Jain |
| b. Sparsh exports pvt. Ltd | Rajendra S Jain (myself) & Surendra Jain |
| c. Karnavatimpexpvt. Ltd | Sachin Pareek and Manish Jain |
| d. Moulimani Pvt. Ltd | Rajendra S Jain |

| | |
|--|----------------------------|
| | (myself) & SachinPareek |
|--|----------------------------|

Q.14 During the survey action undertaken at various office premises of yours; not a single piece of diamond has been found by respective survey teams though there is substantial turnover shown by various concerns controlled by you. Please state as to where do you keep your stock in trade.

Ans. Sir, in this regard, I want to admit that we are engaged in business of bills shopping through all the concerns as named by me in response to your question no. 13 due to which we don't have any physical stock of diamond with us at any of our place at any point of time. I would like to further add that we are merely lending names of our various concerns to the real importers of diamonds who takes the actual delivery of diamonds.”

A reading of the above statement shows Shri Jain has admitted that they are engaged in the business of bills shopping through the above concerns.

It is the duty of the AO to enforce attendance of a witness if his evidence is material. At the same time the assessee must furnish the complete address of such person.

A proper hearing must always include a 'fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view. Cross-examination is allowed by procedural rules and evidently also by the rules of natural justice. Any witness who has been sworn on behalf of any party is liable to be cross-examined on behalf of the other party to the proceedings.

The Hon'ble Supreme Court in *State of Kerala vs. K.T. Shaduli Grocery Dealer* AIR 1977 SC 1627, recognised the importance of oral evidence by holding that the opportunity to prove the correctness or completeness of the return necessarily carry with it the right to examine witnesses and that includes equally the right to cross-examine witnesses.

In *ITO vs. M. Pirai Choodi* (2012) 20 taxmann.com 733 (SC), the Hon'ble Supreme Court has held that “Order of assessment passed without granting an opportunity to assessee to cross-examine, should not have been set aside by High Court; at most, High Court should have directed Assessing Officer to grant an opportunity to assessee to cross-examine concerned witness.”

The importance of cross-examination has been emphasized by the Hon'ble Bombay High Court in the case of *Om Vinyls P. Ltd. vs. ITO* [WP(L) No. 3114 of 2014].

There is no basis on the part of the Ld. CIT(A) of estimating the profit rate by adopting the gross profit rate @ 7.86% in the case of a transaction in which the genuineness is not proved by the assessee.

In view of the above, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a fresh assessment in the light of our observation hereinbefore after giving opportunity to the assessee to cross-examine the concerned parties. We also direct the assessee to file the relevant documents/evidence before the AO.

Needless to say the AO would give reasonable opportunity of being heard to the assessee before finalizing the assessment order.

7. In the result the appeal is allowed for statistical purposes.

Order pronounced in the open Court on 25/09/2017.

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 25/09/2017
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai