

IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI PAWAN SINGH, JM

ITA No.5642/Mum/2012
(Assessment Year :2006-07)

ITO 8(3)(2) 201, Aayakar Bhavan M.K.Marg Mumbai – 400 020	Vs.	M/s. Stones & Jewellery (India) Pvt. Ltd., Gala No.GJ-14 Complex No. SDF-VII, SEEPZ-SEZ Andheri (E), Mumbai – 400 096
PAN/GIR No.		AAECS1797D
Appellant)	..	Respondent)

CO No.243/Mum/2013
(Assessment Year :2006-07)

M/s. Stones & Jewellery (India) Pvt.Ltd., Gala No.GJ-14 Complex No. SDF-VII, SEEPZ-SEZ Andheri (E), Mumbai – 400 096	Vs.	ITO 8(3)(2) 201, Aayakar Bhavan M.K.Marg Mumbai – 400 020
PAN/GIR No. AAECS1797D		
Appellant)	..	Respondent)

Revenue by	Shri V. Justin
Assessee by	Shri Shailesh Parmar
Date of Hearing	30/08/2017
Date of Pronouncement	26/10/2017

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the revenue and Cross Objection by the assessee against the order of CIT(A)-18, Mumbai dated 29/06/2012 for

the A.Y. 2006-07 in the matter of order passed u/s. 143(3) r.w.s. 147 of the IT Act.

2. In the appeal filed by revenue, revenue is aggrieved for upholding addition of 3% on bogus purchase in place of 25% addition made by the AO.

3. In the Cross Objection, assessee is aggrieved for upholding reassessment u/s.147 and for upholding addition of 3% and the purchases from M/s. Zalak Impex.

4. Rival contentions have been heard and record perused.

5. Facts in brief are that assessee is engaged in the business of manufacture and export of jewellery. Assessee's unit was situated at SEZ wherein profit was not liable to tax and is eligible for deduction u/s.10A. Thus, under provisions of Section 10A entire profit of assessee was exempted. In the year under consideration assessee filed its return at income at Rs.12,318/-. Return was subject to scrutiny and assessment was completed u/s.143(3) on 22/09/2008 determining business income at Rs.9,85,900 and income from other sources of Rs.2,34,440/-. After scrutiny assessment was over, the AO reopened the assessment on the plea that survey u/s.133A was carried out in the case of Shri Hiten L. Raval Prop, of M/s. Zalak Impex by the office of Dy. Director of Income tax (Inv.), Unit-IV (3), Mumbai on 04/10/2006. As a result of survey operation, it was unearthed that this person was issuing bogus purchase bills to various concerns. It was further found that the above mentioned assessee

i.e. M/s. Stones & Jewellery (India) P. Ltd. has also made purchase of Rs. 81, 55,385/-during the A.Y. 2006-07 from M/s. Zalak Impex.

6. In view of the facts and circumstances stated above, assessment in this case was reopened u/s. 147 and a notice u/s. 148 was issued vide notice dated 07/12/2010 which was duly served on the assessee on 08/12/2010. In response to the notice u/s. 148 the assessee, vide its Idler dated 06/01/2011 has stated as under:-

i) " Complete details of purchases made by our clients were furnished during the course of the original assessment proceedings ti/s. 143(3) of the Act. these included the purchases made from M/s. Zalak Impex also. These details were also examined by the A.O.

ii) Moreover, the quantitative details of goods purchased and goods exported by our clients were also given, which too were examined by the A.O,

Hi) As for M/s.Zalak Impex, their statement of account, duly confirmed by them was also submitted.

iv) Our clients have not got any bogus purchase bills of Zalak Impex as stated in the reason recorded as above.

v) The re-opening of the assessment of our clients for .A. Y. 2006-07 therefore is nothing but a change of opinion, based on extraneous information not connected with our clients and is therefore not as per {he provisions of law.

vi) We therefore object to the same, as null and void ab-initio.

Without prejudice to our contention as above, we are enclosing herewith the following details as required by you.

1. A statement giving the details of purchases made by our clients from M/s. Zalak Impex., along with copies of each of the purchase bills.

We invite your attention to the copies of the bills, wherefrom it will be observed that each bill bears the stamp of Government of India, Ministry of Commerce, through SEEPZ authorities, Andheri, signifying the receipt of purchased material by our clients, in their factory premises located in SEEPZ SEZ. Mumbai.

2. A statement which gives the billwise details of material purchased from M/s. Zalak Impex and its user to manufacture jewellery therefrom, for the purpose of exports.

3. Copies of sales invoices (exports) in respect of goods manufactured and exported from out of the purchases made from Zalak Impex.

Please note that each invoice also gives the details of quantity exported and the corresponding shipping bill, signifying its export out of India from SEEPZ-SEZ, Andheri by our clients.

7. Not satisfied with the assessee's reply, AO added entire purchase in assessee's income.

8. Before the CIT(A) assessee has challenged both reopening as well as merit of the addition.

9. By the impugned order CIT(A) upheld the reopening, however, he has reduced the addition to 3% after observing as under:-

I have considered submissions of the Ld. Counsel and the main issue involved in this appeal is that when the purchases are held to be 'fake/bogus' but the sales are not be disproved by the I.T. department - the genuineness of the sales stands established - so much so that the export out of India of the jewellery is proved and cannot be impeached by the I.T. department - other independent agencies like , SEEPZ Authorities - further inward remittance of foreign exchange is all proved - then can the A.O. on the basis of statement of oath recorded during the course of survey of the alleged supplier Shri Hiten L. Rawal Prop, of M/s. Zalak Impex hold the entire purchases to be bogus and disallow the same. The appellant has contended that since all the purchases are through inspection by an independent authority - SEEPZ - SEZ and under the complete control of the Deputy Commissioner of Customs and when the 'diamonds' are passed through SEEPZ customs - the relevant documents are stamped and entered in the SEEPZ register - stock record of the unit are updated and then diamonds are issued for manufacturing of jewellery - finished jewellery is exported - after it is examined and checked by SEEPZ Customs - export documents are prepared as per RBI/Customs guidelines and GR, shipping bills, airways bills invoice, packing list etc. are prepared and on the basis of which payments are received into India from overseas - which are monitored by RBI for realization.

5.3 Complete details [both in quantity and in value] with adequate documentary evidence of the entire transaction cycle commencing from the purchase of diamonds and ending with the realization of the export proceeds from the overseas customers, in respect of the gold/diamond studded jewellery manufactured from the diamonds so purchased, were provided both during the original assessment proceedings as well as during the re-assessment proceedings. The details so submitted by the appellant on both the occasions were thoroughly verified by the respective A.O. and were accepted to be true and correct.

5.4 Hence, merely because Shri Hiten L. Rawal Prop, of M/s. Zalak Impex has in his statement on oath recorded on the date of survey stated he has only given accommodation entries and not actually selling diamonds to the appellant so that in turn the appellant can jewellery items for export out of these diamonds - is not correct because as stated above by the appellant - it is these very diamonds which he has manufactured into jewellery items and then exported - them out of India - these sales out of India have been accepted by the

department and on which tax has been levied by the department and foreign exchange realized on the sale of the jewellery items overseas has been brought into India as per RBI guideline and the exemption claimed u/s. 10A of I.T, Act thereon.

5.5 Hence, once, the sale is accepted - inward remittance of foreign exchange is accepted then total purchases cannot be disallowed because that will amounts to taxing 100% profit as has been done by the department in the present case.

5.6 It is settled law that in such cases when the total sales are accepted by the department and the issue is regarding the 'identity' of the purchaser only because without purchases there can be no sales and it is only a question of as to from whom did appellant make the purchases in question - then the total purchase cannot be disallowed as has been done by the A.O. but only a G.P. rate has to be applied because whatever discrepancy and manipulation is there it is only in the value of purchase and in such a case, only the G.P. Rate can be applied.

5.7 In the appellant's case, the position of G.P. is as follows:

Assessment year	G.P. Ratio
2004-05	17.25
2005-06	17.82
2006-07	15.20

The above shows that in A.Y. 2004-05 when the question of fake/bogus purchase was not there, the appellant had shown a G.P. of 17.25%. Similarly in A.Y. 2005-06, the appellant has shown a G.P. of 17.82% and there was no question of bogus / fake purchase. However, in A.Y. 2006-07, there has been a fall in G.P. to 15.20% -which show that over the earlier years, the G.P. has declined by 2.05% to 2.62%.

5.8 Hence, the magnitude of adjustment required to be done in appellant's case on account of bogus/fake purchases will be in the range of 2.05% to 3% approximately of G.P. since, purchases have been manipulated and the identity of the purchaser is not established but at the same time, total sales have been proved to be genuine - and thus, the trading results of earlier years when there was no such manipulation serve as a relevant guide.

5.9 Hence, I direct the A.O. to make a addition of G.P. rate of 3% to the disclosed G.P. of 15.20% shown by the appellant during the year - also following the logic of Hon'ble Mumbai ITAT T' Bench in the case of Free India Assurance Services Ltd. Vs. DCIT (2011) 62 DTK (Mum) (Trib.) 349.

Hence, disallowance of Rs. 81,55,385/- is reduced to Rs. 2,44,662/- (3% G.P. Rate to shown G.P. rate of 15.20%).

In the result, this ground of appeal is partly allowed.

10. It was vehemently argued by learned AR that reassessment itself was not valid in so far as during the course of original assessment proceedings all the information, details of purchases etc., were filed before the AO. Our attention was also invited to the enquiry made by the AO during reassessment proceedings with the custom authorities vide letter dated 16/12/2011 and the reply filed by the office of the Customs wherein they observed as under:-

Please refer to your office letter No. ITO.8(3) (2)/133(6V Info/2011-12 dated 29.11.2011 on the subject mentioned above.

This is to inform that the copy of all the documents were called for from M/s. Stones and Jewellery (I) Ltd and the same has been verified and found that :-

- (i) the signature of the Preventive Officers appears to be genuine.*
- (ii) The amount of remittance against the said exports has been received by the Banks as is appearing in the Bank's statements .*

11. As per learned AR since the unit of the assessee was situated in SEZ, its entire profit was eligible for exemption u/s.10A. Under these facts and circumstances, there was no reason to inflate the purchase price of the goods so purchased. Accordingly, it was contended that there is no justification at all in making addition by estimating further profit of 3%.

12. On the other hand, contention of learned DR was that AO has justifiably made the addition on the basis of survey conducted in the case of Shri Hiten L. Rawal, Proprietor of Zalak Impex, wherein Shri

Rawal accepted that he was involved in issuing bogus purchase bills to various customers.

13. Learned AR also placed on record the order of the Co-ordinate Bench wherein exactly similar issue was dealt with and the entire addition made by AO estimating further profit on bogus purchase to the extent of 7% was deleted by the Tribunal in the case of Tristar Jewellery in ITA No.7593/Mum/2011, ITA No.6435/Mum/2013 and ITA No.8292/Mum/2011 vide order dated 31/07/2015.

14. We have considered rival contentions and carefully gone through the orders of the authorities below.

15. From the record, we found that scrutiny assessment of assessee was carried out by the AO vide order dated 22/09/2008, wherein full information with regard to the entire purchase was called for and filed by the assessee. The same was also verified by the AO and thereafter scrutiny assessment was framed. After the date of scrutiny assessment there was survey at the place of Hiten L Rawal and on the basis of his statement, AO presumed that assessee has made bogus purchases. We found that issue under consideration is squarely covered by the decision of Co-ordinate Bench in the case of Tristar Jewellery (supra), wherein Tribunal with regard to the same survey and addition made by the AO by estimating extra G.P. on bogus purchases was deleted by the Tribunal after having the following observation:-

8. Having heard the parties and having perused the material on record, we find that the completed assessment of the assessee was reopened on the basis of the statement of Shri Hiten L. Rawal, the proprietor of M/s Zalak Impex. In this statement recorded u/s 131 of the Act, Shri Rawal confessed to have provided accommodation entries in the form of sales and purchases, to various parties. The assessee was stated to have obtained bills for non-existing parties, amounting to Rs. 4,09,12,718/-, during the year under consideration. The assessment order dated 21-12-2010 was passed pursuant to the said reopening.

9. It remains undisputed that the assessee was never provided any opportunity to cross examine Shri Hiten L. Rawal, though he specifically asked for such cross examination. On the other hand, the burden was sought to be shifted on the assessee by the A.O., by asking him to produce Shri Rawal, even though it was the A.O. who had relied on the statement of Shri 5 ITA 7593/M/11, ITA 6435/M/13 & ITA 8292/M/11 Rawal, without either confronting this statement to the assessee, or providing opportunity to the assessee to cross examine Shri Rawal. Therefore, the reassessment order is as a result of violation of the natural principle of audi alteram partem. A statement recorded at the back of a party cannot be used against such party without confronting such statement to the party. Hence, on this score alone, the reassessment order is unsustainable in the eye of law and we hereby cancel the same. As a consequence, the order of the ld. CIT(A) is also cancelled in toto.

10. Further, even otherwise, before the A.O., the assessee had contended, by written submissions filed on 25-11-2010, inter alia, that during the year, they had purchased diamonds worth Rs. 4,09,12,718/- from M/s Zalak Impex; that the assessee being in an export promotion zone, the movement of its goods is controlled and customs approved; that the purchases being approved purchases, there was no question of their being bogus purchases. The assessee enclosed the custom approved invoices in respect of purchases from Zalak Impex. These invoices have been produced before us also, in the paper book filed by the assessee. As per these invoices, the goods purchased had been verified and approved by the Customs Authority. This clearly shows that the goods had actually been purchased and received by the assessee. As such, these purchases could not have, by any stretch of imagination, been treated as bogus purchases. It is also noteworthy that the payments made by the assessee to Zalak Impex were through account payee cheques only. Neither of the Taxing Authorities, however, took these invoices into consideration and wrongly held the assessee's purchases from Zalak Impex to be bogus purchases. Nothing has been brought on record to show that these invoices were self made or fabricated. Moreover, the comparative chart of purchases made during the year and the selling price (page 141-144), as filed before the ld. CIT(A) has not been refuted and this also goes to prove the theory of bogus bills and accommodation entries to be wrong. Therefore, the 6 ITA 7593/M/11, ITA 6435/M/13 & ITA 8292/M/11 order under appeal is a result of complete

misreading and non-reading of cogent documentary evidence brought on record by the assessee. For this reason also, along with the reason that the sales made by the assessee were never questioned, the addition is deleted in toto.

16. It is clear from the order of the Co-ordinate Bench that with respect to the similar addition having been made on the basis of survey at the premises of Hiten L. Rawal was deleted by Tribunal. We also found that in the instant case also no opportunity to cross examination was provided by the lower authorities inspite of asking by assessee. As the facts and circumstances in the instant case are parametria to the decision of Tribunal in case of Tristar Jewellery Exports Pvt. Ltd., (supra), we do not find any merit for upholding addition of 3% G.P. on such purchases. It is also pertinent to mention here that entire profit of the assessee was eligible for exemption u/s. 10A in respect of unit situated at the SEZ, therefore, assessee was not going to have any gain by showing lower profit.

17. In the result appeal of the revenue is dismissed whereas Cross Objection filed by the assessee is allowed in part in terms indicated hereinabove.

Order pronounced in the open court on this 26/10/2017

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 26/10/2017
Karuna Sr.PS

Copy of the Order forwarded to :

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

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai