

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH, CHENNAI
श्री जॉर्ज माथन, न्यायिक सदस्य, न्यायिक सदस्य एवं श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER**

आयकरअपीलसं./I.T.A.Nos. 191 to 196/Mds/2017
(निर्धारणवर्ष / Assessment Years: 2007-08 to 2012-13)

M/s. Original Kerala Jewellers, No.91, Sundaram Complex, Usman Road, T. Nagar, Chennai – 600 017.	Vs	The Deputy Commissioner of Income Tax, Non Corporate Circle – 2, Chennai -34.
PAN:AAAFO0104F		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri R. Vijayaraghavan, Advocate
प्रत्यर्थीकीओरसे/Respondent by	:	Smt. S. Vijayaprabha, JCIT

सुनवाईकीतारीख/Date of hearing	:	22.11.2017
घोषणाकीतारीख /Date of Pronouncement	:	11.01.2018

आदेश / ORDER

Per A. Mohan Alankamony, AM:-

These appeals filed by the assessee are directed against the common order passed by the learned Commissioner of Income Tax (Appeals)-2, Chennai dated 31.10.2016 in ITA Nos.55,54,199,52,53,226/CIT(A)-2/2014-15 for the assessment years 2007-08 to 2012-13 passed U/s.250(6) r.w.s. 143(3) & 147 of the Act.

2. **Assessment year 2007 – 08:**

The assessee has raised five grounds in its appeal. However the Ld.AR did not pressed ground No.1 & 2 with respect to reopening of assessment U/s.147 of the Act. The other grounds which survive for adjudication are briefly stated herein below:-

- (i) The Ld.CIT(A) has erred in confirming the addition made by the Ld.AO of Rs.12,51,531/- as unaccounted income of the assessee without granting the benefit of telescoping the addition made in the earlier years.
- (ii) The Ld.CIT(A) has erred in confirming the order of Ld.AO who had disallowed Rs.85,794/- being 1/3rd of the claim of depreciation on car of Rs.1,81,383/- and car insurance of Rs.75,999/- aggregating to Rs.2,57,382/-.

3. **Assessment year 2008 – 09:**

The assessee has raised six grounds in its appeal. However the Ld.AR did not pressed ground No.1 & 2 with respect to reopening of assessment U/s.147 of the Act. The other grounds which survive for adjudication are briefly stated herein below:-

- (i) The Ld.CIT(A) has erred in confirming the addition made by the Ld.AO of Rs.12,51,531/- as unaccounted income of

the assessee without granting the benefit of telescoping the addition made in the earlier years.

(ii) The Ld.CIT(A) has erred in confirming the order of the Ld.AO who had disallowed Rs.1,34,544/- being 1/3rd of the claim of depreciation on car of Rs.3,57,062/- and car insurance of Rs.46,570/- aggregating to Rs.4,03,632/-.

(iii) The Ld.CIT(A) has erred in confirming the order of Ld.AO who had failed to grant deduction of Rs.1,52,213/- being the sales tax paid during the relevant assessment year pertaining to earlier assessment year which was disallowed in those assessment year invoking the provisions of Section 43B of the Act.

4. Assessment year 2009 – 10:

The assessee has raised six grounds in its appeal. However the Ld.AR did not pressed ground No.1 & 2 with respect to reopening of assessment U/s.147 of the Act. The other grounds which survive for adjudication are briefly stated herein below:-

(i) The Ld.CIT(A) has erred in confirming the addition made by the Ld.AO of Rs.15,17,478/- as unaccounted income of the assessee without granting the benefit of telescoping the addition made in the earlier years.

- (ii) The Ld.CIT(A) has erred in confirming the order of Ld.AO who had disallowed Rs.1,05,296/- being 1/3rd of the claim of depreciation on car of Rs.3,15,887/-.
- (iii) The Ld.CIT(A) has erred in confirming the disallowance made by the Ld.AO towards the claim of deduction U/s.36(1)(iii) of the Act amounting to Rs.26,15,622/- by holding that the assessee had diverted its interest bearing funds for non-business purposes.

5. Assessment year 2010 – 11:

The assessee has raised six grounds in its appeal. However the Ld.AR did not pressed ground No.1 & 2 with respect to reopening of assessment U/s.147 of the Act. The other grounds which survive for adjudication are briefly stated herein below:-

- (i) The Ld.CIT(A) has erred in confirming the addition made by the Ld.AO of Rs.82,02,641/- as unaccounted income of the assessee without granting the benefit of telescoping the addition made in the earlier years.
- (ii) The Ld.CIT(A) has erred in confirming the order of Ld.AO who had disallowed Rs.1,34,544/- being 1/3rd of the claim of depreciation on car of Rs.3,57,062/- and car insurance of Rs.46,570/- aggregating to Rs. 4,03,632/-.

6. Assessment year 2011 – 12:

The assessee has raised six grounds in its appeal. However the Ld.AR did not pressed ground No.1 & 2 with respect to reopening of assessment U/s.147 of the Act. The other grounds which survive for adjudication are briefly stated herein below:-

- (i) The Ld.CIT(A) has erred in confirming the addition made by the Ld.AO of Rs.14,45,462/- as unaccounted income of the assessee without granting the benefit of telescoping the addition made in the earlier years.
- (ii) The Ld.CIT(A) has erred in confirming the order of Ld.AO who had disallowed Rs.2,87,293/- being 1/3rd of the claim of depreciation on car of Rs.8,81,879/- (sic) Rs.8,61,879/-.
- (iii) The Ld.CIT(A) has erred in confirming the disallowance made by the Ld.AO amounting to Rs.68,715/- invoking the provisions of Section 40A(3) of the Act being expenditure incurred in cash.
- (iv) The Ld.CIT(A) has erred in confirming the disallowance of interest payment including EMI to various finance companies amounting to Rs.12,51,245/- on the ground that the same was paid without deducting tax.

7. Assessment year 2012 – 13:

The assessee has raised seven grounds in its appeal. However the Ld.AR did not pressed ground No.1 & 2 with respect to reopening of assessment U/s.147 of the Act. The other grounds which survive for adjudication are briefly stated herein below:-

- (i) The Ld.CIT(A) has erred in confirming the addition made by the Ld.AO of Rs.13,01,082/- as unaccounted income of the assessee without granting the benefit of telescoping the addition made in the earlier years.
- (ii) The Ld.CIT(A) has erred in confirming the order of Ld.AO who had disallowed Rs.3,00,363/- being 1/3rd of the claim of depreciation on car of Rs.8,04,246/- and car insurance of Rs.96,844/- aggregating to Rs. 9,01,090/-.
- (iii) The Ld.CIT(A) has erred in confirming the disallowance made by the Ld.AO of Rs.3,56,341/- invoking the provisions of Section 43B of the Act.
- (iv) The Ld.CIT(A) has erred in confirming the disallowance made by the Ld.AO towards the claim of deduction U/s.36(1)(iii) of the Act amounting to Rs.11,32,617/- by holding that the assessee had diverted its interest bearing funds for non-business purposes.

8. The brief facts of the case are that the assessee is a firm engaged in jewelry business. A survey was conducted U/s.133A of the Act on 12.03.2012 wherein various discrepancies with respect to stock was noticed. Thereafter the case was reopened U/s.147 / 148 of the Act and assessment was completed for the assessment years 2007-08 to 2010-11. Further assessments were made on regular scrutiny U/s.143(3) of the Act for the assessment years 2011-12 & 2012-13. In all the above assessment years the Ld.AO made several additions including addition towards undisclosed stock.

9. **Ground (i) : Addition made towards undisclosed stock for the assessment years 2007-08 to 2012-13:-**

During the course of survey proceedings, it was revealed that the assessee had undisclosed stock of gold, silver and diamond jewellery value of which are shown in the table herein below at 'Row X' for the assessment years 2007-08 to 2012-13, against which the assessee had disclosed the value of jewelry for the relevant assessment years in 'Row Y'. The Ld.AO made addition with respect to the difference between the value of undisclosed jewelry admitted during the course of the survey and

the value of the undisclosed jewelry admitted at the time of assessment for relevant assessment years shown in 'Row Z'.

Particulars		2007-08	2008-09	2009-10	2010-11	2011-12	2012-13
		A	B	C	D	E	F
Undisclosed income admitted at the time of survey (in Rs.)	X	1,11,02,030	1,09,71,650	15,17,478	6,67,82,608	14,45,462	13,01,082
Undisclosed income admitted at the time of assessment (in Rs.)	Y	98,50,500	97,20,119	-	5,85,79,967	-	-
Addition made by the Ld.AO which was subsequently confirmed by the Ld.CIT(A) (in Rs.)	Z	12,51,531	12,51,531	15,17,478	82,02,641	14,45,462	13,01,082
Additional stock acquired by the assessee which was not disclosed in the relevant assessment year		12,51,531	Nil (ZB-ZA)	2,65,947 (ZC-ZB)	66,85,163 (ZD-ZC)	Nil (ZE-ZD = negative)	Nil (ZF-ZE = negative)

9.1 Before the Ld.CIT(A) the assessee had explained that the value of stock that was not accounted in the books of accounts were the raw materials such as gold, silver, diamond etc., that was given to the goldsmith for making the jewelry. Further it was submitted that the value of stock added as unexplained income in the assessment year which is not sold during the relevant assessment year should be treated as the opening unexplained stock in the subsequent assessment year, so on and so forth.

However the Ld.CIT(A) held the issue against the assessee by observing as under:-

“Thus it is seen that, far from basing its arguments on concrete evidence to establish the claim of return of the finished jewellery by the goldsmiths to the appellant-firm, the appellant is only indulging in conjectures and probabilities as the highlighted portions of its submissions, clearly reflect. It is pertinent to note that identical submissions have been made by the appellant before the Assessing Officer, who has rightly rejected the same, stating that this contention of the assessee is a mere proposition, and is completely unsupported by any sort of evidence such as identity/address and other details of goldsmiths along with their confirmations of return of such gold.

In conclusion, the Assessing Officer was justified in bringing to tax the entire undisclosed income arising from unaccounted gold stock of jewellery placed outside the books, claimed to be with the various goldsmiths.

The following additions are therefore confirmed:

<i>Asst. Year</i>	<i>Amount of addition confirmed on account of undisclosed income/stock (Rs.)</i>
<i>2008-09</i>	<i>12,51,531/-</i>
<i>2009-10</i>	<i>15,17,478/-</i>
<i>2010-11</i>	<i>82,02,641/-</i>
<i>2011-12</i>	<i>14,45,462/-</i>
<i>2012-13</i>	<i>13,01,082/-</i>

This ground, for AYs. 2008-09 to 2012-13, is hence dismissed.”

9.2 Before us the Ld.AR reiterated the arguments made before the Ld.CIT(A) while as the Ld.DR relied on the orders of the Ld.Revenue Authorities.

9.3 We have heard the rival submissions and carefully perused the materials on record. We find merit in the submissions of the Ld.AR. From the chart herein above it is evident that for the assessment years 2007-08 the assessee had admitted undisclosed stock for Rs.12,51,531/- which is added to the income of the assessee in that assessment year. We do not find any infirmity in the order of the Ld.Revenue Authorities on this issue.

Hence we hereby sustain the addition of Rs.12,51,531/- made towards undisclosed stock for the assessment year 2007-08.

However in the subsequent assessment year 2008-09, there is no addition to the undisclosed stock which means that the undisclosed stock acquired by the assessee for the assessment year 2007-08 remained with the assessee during the assessment year 2008-09. Hence if this amount of Rs.12,51,531/- is added once again to the income of the assessee as unexplained stock in the assessment year 2008-09, it would amount to double addition which is not tenable in law. Therefore the value of the stock for Rs.12,51,531/- cannot be added to the income of the assessee for

the assessment year 2008-09. **Hence we hereby direct the Ld.AO to delete the addition of Rs.12,51,531/- made on account of undisclosed stock for the assessment year 2008-09.** In the assessment year 2009-10, the value of undisclosed stock has increased from Rs.12,51,531/- to Rs.15,17,478/-. Which means that during the assessment year 2009-10, the assessee had acquired additional stock value of Rs.2,65,947/- (Rs.15,17,478 – Rs.12,51,531) which is not disclosed in its books of accounts. Hence for the assessment year 2009-10, addition can be made only to the extent of Rs.2,65,947/-. **Therefore the Ld.AO is hereby directed to sustain the addition of Rs.2,65,947/- for the assessment year 2009-10 as against the addition made for Rs.15,17,478/-.** Similarly during the assessment year 2010-11, the value of stock that was not disclosed in the books of accounts of the assessee increased from Rs.15,17,478/- to Rs.82,02,641/-. Which means that during the assessment year 2010-11, the assessee had acquired additional stock valued Rs.66,85,163/- (Rs.82,02,641 – Rs.15,17,478) which is not disclosed in the books of account. Hence for the assessment year 2010-11, addition can be made to the tune of Rs.66,85,163/- only. **Therefore we hereby direct the Ld.AO to sustain the addition of Rs.66,85,163/- as against the**

addition of Rs.82,02,641/- made by the Ld.AO for the assessment year 2010-11. In the assessment year 2011-12, the value of undisclosed stock has reduced from Rs.82,02,641/- to Rs.14,45,462/- which implies that the stock of Rs.14,45,462/- is the balance stock left out from the undisclosed stock of Rs.82,02,641/- which was not disclosed in the books of accounts for the assessment year 2010-11. Therefore addition of Rs.14,45,462/- cannot be made for the assessment year 2011-12 because it would amount to double addition. **Hence we hereby direct the Ld.AO to delete the addition of Rs.14,45,462/- made towards undisclosed stock for the assessment year 2011-12.**

Similarly in the assessment year 2012-13 the undisclosed stock has reduced from Rs.14,45,462/- to Rs.13,01,082/- which implies that the stock of Rs.13,01,082/- is the balance stock left out from the undisclosed stock of Rs.14,45,462/- which was not disclosed in the books of accounts for the assessment year 2011-12. Therefore addition of Rs.13,01,082/- cannot be made for the assessment year 2012-13 because it would amount to double addition. **Hence we hereby direct the Ld.AO to delete the addition of Rs.13,01,082/- made towards undisclosed stock for the assessment year 2012-13.** It is ordered accordingly.

10. **Ground (ii) : Disallowance of depreciation and Insurance of car for the assessment years 2007-08 to 2012-13:-**

The assessee had claimed depreciation and expenses towards insurance with respect to the car owned by it. The Ld.AO opined that the car was also used by the partners in the assessee firm for their personal purpose therefore 1/3rd of the expenses should be disallowed. Accordingly the Ld.AO disallowed 1/3rd of the expenses incurred towards insurance and depreciation on the car owned by the assessee firm. On appeal, the Ld.CIT(A) confirmed the order of the Ld.AO by agreeing with his view. Before us the Ld.AR could not establish that the car was used only for business purpose. In this situation we do not find it necessary to interfere with the orders of the Ld.Revenue Authorities on this issue. Accordingly the orders of the Ld.AO stands confirmed on this issue.

11. **Assessment year 2008-09:**

Ground No.3(iii) : Disallowance of Rs.1,52,213/- U/s.43B of the Act:-

During the course of scrutiny assessment it was observed by the Ld.AO that as per column 21(B) of 3CD, a sum of Rs.1,52,213/-

being VAT was shown as unpaid before the due date of filing the return of income. Therefore the Ld.AO disallowed the expenditure of Rs.1,52,213/- by invoking the provisions of Section 43B of the Act. Before the Ld.CIT(A), the assessee had not furnished any convincing reply, therefore he sustained the order of the Ld.AO. Before us also, the assessee has not brought out any materials to establish that it had paid the VAT within the time limit prescribed under the Act. Therefore we do not find it necessary to interfere with the orders of the Ld.Revenue Authorities on this issue. Hence we confirm the order of the Ld.AO on this issue.

12. Assessment year 2009-10 & 2012-13:

Ground No.: 4(iii) & 7(iv) : Interest disallowance U/s.36(1)(iii) of the Act :-

During the course of scrutiny assessment for the assessment year 2009-10 & 2012-13, the Ld.AO observed that in the assessment year 2009-10 the partner in the assessee firm Mr. Babu Emmanuel had opening debit balance of Rs.35,32,880/- and closing debit balance of Rs.90,76,575/- in his current account. It was also revealed that the assessee firm had incurred interest expenditure of Rs.1,34,43,575/- during the assessment year 2009-10. Similarly for the assessment year 2012-13 the partner in

the assessee firm Mr. Babu Emmanuel had closing debit balance of Rs.61,59,931/- and his daughter Ms.Nivya Babu had closing debit balance of Rs.36,97,411/- and the assessee firm had incurred interest expenditure of Rs.1,20,49,115/-. Therefore the Ld.AO opined that the assessee firm had diverted its interest bearing funds for non-business purpose. Hence the Ld.AO disallowed proportionate interest of Rs.26,15,622/- for the assessment year 2009-10 and Rs.11,32,617/- for the assessment year 2012-13, placing reliance in the decision of the Hon'ble Jurisdictional High Court in the case K. Somasundaram & others reported in 238 ITR 939 wherein it was held that "interest paid on the diverted fund for non-business purposes cannot be claimed as allowable deduction U/s.36(1)(iii) of the Act". The Ld.CIT(A) upheld the view of the Ld.AO further relying in the case SA Builders Ltd vs. CIT(A) decided by the Hon'ble Apex Court reported in 288 ITR 1.

12.1 Before us the Ld.AR submitted that the assessee firm had extended credit to the partner of the assessee firm out of non-interest bearing funds / own funds and therefore the above decisions referred by the Ld.Revenue Authorities is not applicable to the case of the assessee. He further argued stating that

assessee's fixed capital & reserves should also be taken into consideration while computing the own funds held by the assessee. The Ld.DR on the other hand relied on the orders of the Ld.Revenue Authorities.

12.2 We have heard the rival submissions and carefully perused the materials available on record. After examining the issue we find merit in the submission of the Ld.AR. It is obvious that the fixed capital and the accumulated reserves of the assessee firm should be treated as the own non-interest bearing funds of the assessee firm because there is no financial charge suffered by the assessee firm towards capital contribution and accumulated profit. Further if the assessee firm has extended credit to the partners of the firm out of its own non-interest bearing funds such as the aggregate of fixed capital, current account and accumulated profit, reserves, then disallowance cannot be made on the ground that interest bearing funds are diverted for non-business purposes. Since the assessee has not furnished its statement of affairs and other particulars, it is not possible for us to find out whether the assessee has extended credit to the partners in the assessee firm from its non-interest bearing funds. Therefore we remit back the matter to the file of Ld.AO to verify the books of the assessee and

pass appropriate order in accordance with law and merit and also based on our observations made herein above. It is ordered accordingly.

13. **Assessment year 2011-12**

**A) Ground No.6(iii) : Disallowance of Rs.68,715/-
U/s.40A(3) of the Act:-**

During the course of scrutiny assessment, the Ld.AO observed that the assessee had disclosed in Annexure – V to Form 3CD the amount of Rs.3,97,165/- as inadmissible U/s.40A(3) of the Act. However in the computation statement the assessee had disallowed the expenditure of Rs.3,28,450/- with respect to the applicability of Section 40A(3) of the Act. On query it was explained that the amount of Rs.68,715/- (Rs.3,97,165 – Rs.3,28,450) was spent for purchase of diesel for the generator. The assessee further clarified that the petroleum dealers do not accept cheque or DD and therefore the assessee was forced to make payment by cash. However since the assessee's case did not fall in the exceptions stipulated in Rule 6DD of the Rules, the Ld.AO disallowed the amount of Rs.68,715/- by invoking the provisions of Section 40A(3) of the Act. On appeal, the Ld.CIT(A) confirmed the order of the Ld.AO by agreeing with his view.

Before us also the assessee has not furnished any evidence to show that the payment or the aggregate of payments made to the petroleum dealer in a day does not exceed Rs.10,000/-. Therefore we do not find it necessary to interfere with the orders of the Ld.Revenue Authorities. According the order of the Ld.AO is hereby confirmed on this issue.

B) Ground No. 6(iv) : Disallowance U/s.40(a)(ia) of the Act for the assessment year 2011-12:-

During the course of scrutiny assessment, it was observed by the Ld.AO that in Form 3CD the amount of Rs.12,51,245/- was stated as inadmissible expenditure U/s.40(a)(ia) of the Act due to non-compliance of TDS provisions. However in the computation statement, the assessee had not disallowed the expenditure of Rs.12,51,245/-. On query the assessee had explained stating that the amount of Rs.12,51,245/- consists of EMI which includes both interest and principal amount paid to various finance companies. The assessee further relied in the decision of the Special Bench of the Tribunal in the case Merilyn Shipping and Transports vs. Addl. CIT reported in 136 ITD 23 wherein it was held that the provisions of Section 40(a)(ia) of the Act will not apply, if the amount was already paid by the assessee before the close of the relevant

previous year. Since the assessee had already paid the amount of Rs.12,51,245/- before the end of the relevant previous year, the Ld.AR pleaded that disallowance may not be made invoking the provisions of Section 40(a)(ia) of the Act. However the Ld.AO rejected the prayer of Ld.AR by placing reliance in the decision of the Hon'ble Gujarat High Court in the case CIT vs. Sikandarkhan N. Tunvar reported in 33 taxmann.com 133, wherein it was held that disallowance U/s.40(a)(ia) of the Act does not distinguish between the amount 'paid' and 'payable' and disallowed the amount of Rs.12,51,245/- as allowable deduction. On appeal, the Ld.CIT(A) confirmed the order of the Ld.AO agreeing with the view of the Ld.AO.

At the outset, we find that the issue is well settled by the decision rendered by the Hon'ble Apex Court in the case Palam Gas Service vs. CIT, Civil Appeal No.5512 of 2017 vide order dated 03.05.2017, wherein it is held that though the word used in Section 40(a)(ia) of the Act is 'Payable', it would also cover the situation where the amount is already paid but no tax was deducted. **Therefore we hereby confirm the order of the Ld.AO on this issue. However we also make it clear that the provisions of TDS is not applicable to the principal amount**

repaid by the assessee and hence to that extend provisions of Section 40(a)(ia) of the Act will not be applicable.

14. Assessment year 2012-13

Ground No.7(iii) : Disallowance of Rs.1,52,213/- U/s.43B of the Act:-

During the course of scrutiny assessment, the Ld.AO observed that in column 21(B) of Form 3CD, Rs.1,52,213/- was shown as unpaid VAT to be disallowed U/s.43B of the Act. However in the computation statement the assessee had not disallowed the amount of Rs.1,52,213/-. In the written submission the assessee had not made any convincing submissions. Therefore the Ld.AO disallowed the amount of Rs.1,52,213/- invoking the provisions of Section 43B of the Act, which the Ld.CIT(A) also subsequently confirmed. Before us also the assessee has not furnished any particulars with respect to its stand. Therefore we do not have any other option but to confirm the order of the Ld.AO on this issue. It is ordered accordingly.

15. In the result appeal of the assessee for the assessment year 2007-08 is dismissed and the appeals of the assessee for the assessment years 2008-09, 2010-11 & 2011-12 are partly

allowed and the appeals of the assessee for the assessment years 2009-10 & 2012-13 are partly allowed for statistical purposes as indicated herein above.

Order pronounced on the 11th January, 2018 at Chennai.

Sd/-
(जॉर्ज माथन)
(George Mathan)
न्यायिक सदस्य/Judicial Member

Sd/-
(ए. मोहन अलंकामणी)
(A. Mohan Alankamony)
लेखा सदस्य/Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 11th January, 2018

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

- | | | |
|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |