

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पॉल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA No.455/JP/2015
निर्धारण वर्ष / Assessment Year : 2010-11

M/s Kothari Jewels Private Ltd., 5 th Floor, KGK Tower, Dutta Pada Road, Near Ekta Bhoomi Garden, Rajendra Nagar, Borivali (East) Mumbai-66	बनाम Vs.	The Asstt. Commissioner of Income Tax Central Circle-2, Jaipur
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AABCA2717Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri S. R. Sharma &
Shri R. K. Bhatra (CA)
राजस्व की ओर से / Revenue : Shri Varindar Mehta (CIT)

सुनवाई की तारीख / Date of Hearing : 22/03/2018
उद्घोषणा की तारीख / Date of Pronouncement: 04/04/2018

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-4, Jaipur dated 16.03.2015 wherein the assessee has taken the following grounds of appeal as under:-

"1. On facts and in law, the learned Commissioner of Income-tax (Appeals) had erred in confirming the addition of Rs. 1,04,49,607/- to the total income of the appellant company by estimating the Gross Profit at a sum of Rs. 1,65,79,147/- as against Rs. 61,29,540/- declared by appellant.

2. On facts and in law, the learned Commissioner of Income-tax (Appeals) had erred in confirming the rejection of books of accounts of the appellant under section 145(3) of the IT Act, 1961, merely on the ground that the appellant company should have sold its total stock of goods to its sister concern at arm's length price and not at mutually agreed price."

2. Briefly stated, the facts of the case are that a search and seizure action u/s 132 of the Income Tax Act, 1961 and/or survey action u/s 133A of the Act were carried out by the Department on the members of KGK Group on 06.05.2010 of which the assessee is one of the members. Pursuant to issuance of notice u/s 153A of the Act, the assessee filed its return of income on 22.12.2011 declaring income of Rs. 19,93,359/- including an amount of Rs. 7,90,000/- on account of documents seized during search and admitted in the post search proceedings. During the course of assessment proceedings, the AO observed that the assessee has entered into an agreement dated 24.11.2009 with M/s KGK Creation (I) Pvt. Ltd., which is a sister concern of the assessee company and in terms of the said agreement, the assessee has agreed to transfer to the purchaser company, the entire stock of raw material and finished goods valued at Rs. 6,64,62,716/-. An analysis was made by the AO in respect of 18ct gold weighing 18.10337/- Kg which has been sold for Rs. 1,95,54,089/-. The AO observed that as a result of this transfer, the gross profit has fallen drastically as compared to the previous years and the assessee was required to show cause as to whether the stock has been transferred at fair market value considering the fact that the transferee concern is a related concern. The reply of the assessee was considered. It was observed by the AO that 18ct gold weighing 18.10337/- kg was sold for Rs. 1,95,54,089/- and the rate per gram works out to Rs. 1074.61 whereas the rate of pure gold on the date of such transfer was Rs. 1756/- per gram and rate of 18ct gold was accordingly worked out at Rs. 1317 per gram. The

AO thus determined loss of Rs. 43,99,029/- in respect of the said transaction which has been held as not done at arm's length price. In its reply, the assessee submitted that the entire stock has been sold because of the closure of the business activities and the stock was obsolete and slow moving and even in the books of accounts of the purchaser, the sold items are slow moving and some of the items had to be melted. It was further submitted that no incriminating material has been found to suggest that the assessee received money over and above the agreed consideration. It was further submitted that the stock transfer decision was taken in the Board meeting of the company held on 17.08.2009 and at that time, the standard rate of 18ct gold was Rs. 1135 per gram and that negotiations were going between the assessee company and the purchaser since August, 2009 and finally an agreement was entered into on 24.11.2009. Further, it was submitted that the fall in the GP rate as compared to the previous years was on account of fact that due to economic slowdown, the diamond industry was worst impacted and the prices of diamonds had fallen by around 40% coupled with the fact that assessee company has closed down its operations in November 2009 and disposal of slow moving stock. It was further submitted that the transaction is at arm's length and both the companies are taxable entities. The reply filed by the assessee was considered but was not found acceptable by the AO for the various reasons. The AO observed that both the entities are held and controlled by the same family as it is clear from the share holding pattern of these two companies as on 31.03.2010. It was further observed by the AO that the claim of the assessee that stock transfer was obsolete and slow moving does not have any basis/evidence and the assessee's submission regarding details of the item wise movement in the transferee company wherein it was tried to be shown that even though the stock has been sold, the goods are not being sold regularly, was not found acceptable. Regarding the claim that some of the items have been melted and the loss has been suffered by the transferee company, the AO observed that resultant profit/loss

belongs to the transferee company and the assessee should not be bothered about the same once it has sold the stock. The AO further observed that the assessee has diligently prepared and submitted quantitative daily chart for last 3 years but has failed to establish whether the items sold in stock transfer agreement were existing for last many years. It was accordingly held that it cannot be said that sales to sisters concern are at arm's length price and whether the assessee would have sold these goods at the same prices to any other unrelated third party. The AO observed that it cannot be said with certainty that the transaction of sale to sister concern is at arm's length price and an adjustment is required to be made as the accounts of the assessee do not represent a true picture of the state of affairs and the books of accounts were accordingly rejected in terms of the provisions of section 145(3) of the Act. Regarding estimation of GP rate, the AO observed that under no circumstances, can gold and other precious metals be sold at below market price and this clearly shows that in the instant case, the assessee has not reflected true GP on its sale by stock transfer to its sister concerns and as per discussion above, the difference in gold rates on the date of transfer comes to Rs. 43,99,029/-. The AO thereafter worked out the average GP (2003-04 to 2009-10) at 17.14% and after giving credit to the assessee on account of bulk deal and closer of its business, the AO applied a GP rate of 15% to the declared sales turnover of the assessee i.e. Rs. 11,05,27,652/- and works out GP of Rs 1,65,79,147 and after given credit of GP declared by the assessee of Rs. 61,29,540/-, an addition of Rs. 1,04,49,607/- was made in the hands of the assessee company.

3. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT who has confirmed the findings of the Assessing Officer and his relevant observations are contained at Para 5.4 of his order which is reproduced as under:-

"5.4 I have carefully considered the submissions of the appellant as also the findings of the AO. It may be noted that assessee has sold its entire stock to its sister concern namely M/s KGK Creations Pvt. Ltd. The AO's case was that the assessee has not sold such stock to its sister concern at the prevailing market rate and that due to such transaction between the two sister concerns the profit of assessee company drastically reduced in as much as in earlier years the gross profit used to be in the rate of 11 to 20% whereas in the A.Y. under consideration due to such transaction the GP was reduced to 6%. The AO further noted that some of the stock particularly the 18KT gold finished stock weighing 18.1033 Kg. which was sold at Rs. 19454089 and that the stock of the gold items was even sold below the prevailing market rates in as much as in such sale of gold items itself the assessee suffered loss of Rs. 43,99,029. Accordingly as per AO such sale transaction cannot said to be of genuine nature and that the book result shown by the assessee on the basis of such sale transaction to the sister concern cannot said to be true and correct. Accordingly, the AO applied provisions of sec. 145(3) of IT Act and estimated the profit by applying GP rate of 15% as compared to GP rate of 20% in the immediate preceding A.Y. On the other hand the appellant's case is that the sale transactions to the sister concern were made at the lower rate because of the reason that the assessee was to close such business as also that such stock was of obsolete nature.

In support of such contention the assessee also submitted that such stock was even not easily saleable by the sister concern in as much as the sister concern could manage to sale only 665 items of gold jewellery and remaining 538 items of gold jewellery has to be melted. It is also stated that there is nothing on record which may indicate that any extra consideration was received from the sister concern on account of such sale and that reduction in GP rate cannot be the sole ground for rejection of books of accounts. The appellant also placed reliance on various case laws as mentioned in the

written submission in its support. On careful consideration of all the relevant facts it may be noted that the appellant has sold such stock of gold and other precious/ semi precious items and there is no dispute on the fact that the sale has been made to its own sister concern. There is also no dispute on the fact that the assessee concern has always shown GP rate of 11 to 21% between the periods A.Y. 2003-04 to 2011-12 whereas during the A.Y. under consideration due to such sale the GP rate has decreased to 6%. It is further noted that there were no compelling circumstances to make such sale at such a lower rate. It is also to be noted that the stock of the gold precious/ semi precious items was neither of perishable nature nor of obsolete nature. In this circumstances the question arises whether if such stock was not to be sold to the sister concern, whether the assessee would have sold such stock to any third party on such reduced rate and the answer may be that the assessee would not have sold such stock to any third party on such reduced rate as the stock is not of that type which may lose its value in short or long term. In these circumstances when prima facie there were no compelling circumstances to sell the stock at such reduced rate particularly in case of gold ornaments when the selling rate is even found to be lower than the prevailing rate then definitely the sale of such items to the sister concern cannot be said to be fair and reasonable. As regard, the contention of the appellant that there was nothing on record which may indicate that any extra consideration was received on account of such sale, it may be mentioned that the transaction was between the two sister concern and in such transaction it cannot be expected that the revenue may bring on record any such evidence. Accordingly, as one main item of the trading account i.e. sales were found to be made not on the normal prevailing rate that too to a sister concern then the AO was justified to invoke provisions of sec. 145(3) of IT. Act. As regards the contention of the assessee that even the buyer party i.e. the sister concern was not able to sell all the items and that part of the items has to be melted, it may be mentioned that the melting of some of the items can also

be due to the fact that such activity may have been more profitable to the sister concern. Accordingly the action of the AO of rejection of the books of accounts is confirmed. As regards the estimation of profit after rejection of books of accounts, it may be mentioned that it is a settled law that after rejection of books of accounts the profit is to be estimated either on the basis of past history of the appellant's case or on the basis of any comparable case. Reliance is placed on the following case laws:

- i) CIT vs. Inani Marbles Pvt. Ltd. (2009) 316 ITR 125 (Raj)*
- ii) Ajay Goyal vs. ITO (2006) 99 TTJ 164 (ITAT, Jaipur)*
- iii) ITO Ward 2 Churu vs. Jai Construction Co., ITA NO. 64/JU/2014 (ITAT, Jodhpur)*
- iv) M/s Bhika Ram Devrath vs. ITO Ward-1, Churu, ITA No. 245/Jodh/2013 (ITAT, Jodhpur).*

As regards the various case laws relied upon by the appellant it may be mentioned that in these case laws essentially it has been held that the decrease in GP rate cannot be the sole basis for rejection of books of accounts. However the facts of the appellant's case are different in as much as the decrease in GP rate was solely due to the sale of whole stock to the sister concern at a drastically reduced rate that too in the circumstances when there was prima facie no justification for sale of such stock at such reduced rates. Even the ratio laid down in the case of Malani Ramjeevan Jagganath vs. ACIT (2009) 316 ITR 120 by Hon. Rajasthan High Court is not applicable to the facts of the appellant's case in as much as in this case the Hon. Rajasthan High Court has held that the when opening stock, purchase, sales and closing stock was not doubted and the assessee has furnished proper explanation for decrease in the GP rate then the books of accounts cannot be rejected and no trading addition can be made. However in the appellant's case the sales shown to the sister concerns at a drastically reduced rate was not found to be of genuine

nature as also that the assessee has not properly justified decrease in the GP rate. Therefore the facts of the appellant's case definitely differed with the facts of the case decided by the Hon. Rajasthan High Court.

In this background, it may be noted that the immediate preceding AY the assessee has shown GP rate 20%. The AO has also noted that average GP rate during the AY 2003-04 to 2009-10 was 17.14%. Considering these facts as also the fact that bulk deal of sale of stock was made as also that the business was to be closed the AO has given necessary credit and accordingly estimated the profit by applying GP rate of 15%. The estimation of the profit by the AO by applying GP rate 15% is found to be very reasoned and accordingly, no interference is called for in respect of trading addition of Rs. 1,04,49,607 and the same is confirmed."

4. During the course of hearing, the Id. AR submitted that the submissions made before Id. CIT(A) including the judicial precedents cited before him have not been appreciated in correct perspective by the Id CIT(A). The Id AR thereafter took us through the findings of the Id CIT(A) and reiterated the contentions so made in the written submissions which are reproduced as under :

3.2 Ld. CIT(A) has confirmed the rejection of books by holding, as under:-
"...Accordingly, as one main item of the trading account i.e. sales were found to be made not on the normal prevailing rate that too to a sister concern then the AO was justified to invoke provision of section 145(3) of IT Act..."

3.3 It is undisputed that complete set of books of accounts were produced during assessment proceedings and not a single defect was found or pointed out in those records. To substantiate the transaction with the

sister concern below mentioned detailed explanation along with factual data were submitted before the lower authorities:-

S.No.	Particulars	PB
1	Submissions, dated 18.03.2013, made to the Id. AO, regarding fall in the GP Rate and sale of goods at fair market value	14-19
2	Quantitative details of raw material, work in progress and finished goods of the assessee company for the FY 2005-06 to 2009-10	32-36
3	Statement showing jewellery purchase register of KGK Creations (I) Pvt. Ltd. in respect of goods purchased from the assessee company	37-59
4	Statement showing year wise movement of finished goods purchased from assessee company by KGK Creations (I) Pvt. Ltd. vide agreement dated 24.11.2009.	60
5	Jewellery melting register of KGK Creations (I) Pvt. Ltd. for the FY 2009-10 to 2012-13.	61-73
6	Submission dated 22.03. 2013 to the Id. AO with regard to established norms of wastage/manufacturing loss in the jewellery sector.	82-83
7	Submission dated 25.03.2013 to the Id. AO explaining that the sale made by the assessee company to its sister concern was at ALP and did not result in diversion of profit to the sister concern.	91-92

3.4 Books of Accounts maintained in regular course of business cannot be rejected unless there are strong and sufficient reasons to indicate that they are unreliable. Hon'ble Supreme Court in the case of Woodward Governor India Private Limited [2009] 312 ITR 254 (SC)

held that *"...Accounts regularly maintained in the course of business are to be taken as correct unless there are strong and sufficient reasons to indicate that they are unreliable..."*

- 3.5 The primary condition for rejecting the book results as laid down under section 145 of the Income-tax Act, 1961 is that the Id. AO should be satisfied that the books of account maintained by the assessee are not complete and correct. As can be seen from the findings of the lower authorities, there is no instance of falsity or incompleteness of the books of account. The books of account reflect the true state of affairs of the assessee company. Under such circumstances merely because the assessee company sold its products to its sister-concern, at a price lesser than the prevalent market price on the date of sale, would not be a sufficient ground to come to a conclusion that books of account of assessee company were not complete or correct. This finding cannot, in any way, warrant rejection of books of accounts. Similar ratio, under identical set of facts, has been laid down by the Hon'ble ITAT Bangalore Bench in the case of Sphoorti Machine Tools (P.) Ltd [2013] 30 taxmann.com 413 (Bangalore - Trib.) in which the Hon'ble Bench held that *"...The fact that the assessee has sold its products to its sister-concerns at a price lesser than the price at which the same product is sold to the third parties, in our opinion, would not be a sufficient ground to come to a conclusion that the books of account of the assessee are not complete and correct. There is no evidence brought on record that over and above the price shown in the books of account, the assessee received something more from M/s. Pragathi Automation P. Ltd. As rightly contended on behalf of the assessee it is for the businessman to decide the price at which he has to sell its products to its customers. The law is well-settled that the Revenue*

cannot insist on the way in which businessmen should conduct his business. The Revenue cannot compel a businessman to sell its products at a particular price, so that the assessee derives maximum profit..."

- 3.6 Reliance is also placed on the order of Hon'ble Punjab & Haryana High Court in the case of Saimbhi Cycles & Auto Industries, Ludhiana [2015] 229 Taxman 552 (Punjab & Haryana) wherein the Hon'ble High Court has upheld the following finding of Hon'ble ITAT contained in Para 7 of the order. The same is reproduced for the sake of convenience:-

"...The above findings were affirmed by the Tribunal vide order dated 29.4.2013, Annexure A.III with the following observations:—

"8. We have considered the rival submissions carefully. We find that first of all the assessee is a concern wherein assessee was entitled to deduction under section 80IB of the Act @ 25% which would mean that effective tax rate would be 22.50% whereas the sister concern M/s Darshan Udyog is required to pay tax @ 30%, therefore, there was no incentive to make sales at lower rate. In any case, in the detailed submissions before the Assessing Officer and CIT(A) it demonstrated that practically no sales have been made to outside parties and therefore, comparison is not correct. In any case, the Hon'ble Supreme Court in the case of CIT v. Glaxo Smithkline Asia (P) Limited has clearly held that since there was no provision to make addition on account of receipts which are at less than the fair market value, therefore, such additions are not justified. In these circumstances, we find nothing wrong with the order of learned CIT(A) and we confirm the same...."

- 3.7 In view of the above, provisions of section 145(3) have been wrongly invoked.
- 3.8 Ld. AO, under misconception, has applied Domestic Transfer Pricing norms as contained in Chapter X of Income Tax Act, 1961. It may be noted that these norms for Domestic Transactions were introduced by the Finance Act, 2012 w.e.f. 01/04/2013 i.e. A.Y. 2013-14. Therefore, for the year under consideration, i.e. AY 2010-11, no such law existed which conferred authority on the ld. AO to enhance Gross Profit w.r.t sales to sister concern.
- 3.9 Hon'ble Supreme Court in the case of GlaxoSmithkline Asia (P) Ltd. [2010] 195 Taxman 35(SC) had observed that without Domestic Transfer Pricing Law finding place in the statute book, Tax Authorities have no right to make adjustments regarding domestic sales made to sister concerns on the line of Transfer Pricing law for International Transactions. Thereafter, Domestic Transfer Pricing Law was introduced by the Finance Act, 2012 w.e.f. 01.04.2013.
- 3.10 Attention is also drawn towards the fact that even after the introduction of Domestic Transfer Pricing Law by the Finance Act, 2012 w.e.f. 01.04.2013, the sales to the Associated Enterprises are not covered in all circumstances. Section 92BA defining the "specified domestic transactions" reads as under:-
"For the purposes of this section and sections 92, 92C, 92D and 92E, "specified domestic transaction" in case of an assessee means any of the following transactions, not being an international transaction, namely:—

(i) any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A;

(ii) any transaction referred to in section 80A;

(iii) any transfer of goods or services referred to in sub-section (8) of section 80-IA;

(iv) any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;

(v) any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable; or

(vi) any other transaction as may be prescribed,

and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of [twenty] crore rupees. "

Thus, even after introduction of Domestic Transfer Pricing, present case of sale to the sister concern are not covered within its ambit.

3.11 Assessee company has all the right to sell its goods at a price, mutually negotiated, found prudent as a businessman provided there is no allegation of any receipt over and above the declared consideration. Hon'ble Supreme Court in the case of S.A. Builders Ltd. [2007] 288 ITR 1 (SC)(Case Law Page 21) held that *"...the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent*

businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman....”

3.12 Above ratio laid down by the Hon’ble Supreme Court in the case of S.A. Builders Ltd. (supra) is a settled legal proposition. Presently, because of specific provision of law, Tax Authorities are permitted only in the following two situations to replace Sale Price by Fair Market Value:-

3.12.1 Section 43CA where for sale of land and building in the regular course of business can be replaced by stamp duty valuation.(inserted by the Finance Act, 2013, w.e.f. 1.04.2014)

3.12.2 Section 92, transactions with Associated Enterprises for specified domestic transactions as per the special provisions contained in Chapter X of Income Tax Act, 1961.(inserted by the Finance Act, 2012 w.e.f. 01.04.2013)

Assessee company’s case is not covered by any of the above situations.

3.13 It is submitted that the transactions between assessee company and its sister concern is “Tax Neutral” as both the entities are taxable at the same rate of 30.9%. There is no carry forward loss in any of the concerns, nor there is any issue of surcharge involved in any of the two companies.

3.14 Hon’ble Supreme Court in the case of CIT v. GlaxoSmithkline Asia (P) Ltd. [2010] 195 Taxman 35(SC) held that in the case of related party domestic transactions, the under-invoicing of sales and over-invoicing of expenses ordinarily will be revenue neutral in nature, except in two circumstances having tax arbitrage-

- 3.14.1 If one of the related Companies is loss making and the other is profit making and profit is shifted to the loss making concern; and
- 3.14.2 If there are different rates for two related units (on account of different status, area based incentives, nature of activity, etc.) and if profit is diverted towards the unit on the lower side of tax arbitrage. For example, sale of goods or services from non-SEZ area (taxable division) to SEZ unit (non-taxable unit) at a price below the market price so that taxable division will have less profit taxable and non-taxable division will have a higher profit exemption.

Therefore, the proposition of tax neutrality holds good in the case of domestic transactions between the related parties. Lower Authorities have gravely erred in rejecting this proposition put forth before them.

- 3.15 Same Assessing Officer, acting as Id. AO, for KGK Creations (India) Private Limited(buyer company), during the course of proceedings under section 143(3) read with Section 153A, accepted the purchase price of the goods bought from the assessee company.
- 3.16 While estimating the profits, Id. AO at Page 7 of his order has partially accepted the reason explained before him for fall in GP. Also, no reason is given, for only partially accepting the explanation. Relevant para is reproduced hereunder for the sake of ready reference:-

"..If some more credit is given to the assessee on account of bulk deal and closure of business, it would be appropriate to apply a GP rate of 15% to the declared sales turnover of the assessee i.e. Rs. 11,05,27,652.."

3.17 Entire jewellery sold by the assessee company to its sister concern was old fashioned and slow moving. It is well established from the fact that quantitative details of finished goods, as reported in the Tax Audit Report for AY 2006-07 to AY 2009-10 indicate that whatever new jewellery was manufactured/purchased got sold and the old style gold jewellery, remained in stock continuously over years. Further out of 1330 items of gold jewellery sold, the sister concern (purchaser company) could subsequently sell only 665 items. Out of the remaining, 538 items were melted and the rest were lying in the stock. Allegation of the Id. CIT(A) that melting may have been more profitable for the sister concern is simply based on conjecture and surmises.

3.18 The rate of 18 Ct. gold on the date when the sale was made by assessee company to its sister concern was Rs. 1317 per gram. Whereas the actual rate at which the gold jewellery was sold was Rs. 1075 per gram resulting into difference of Rs. 242 per gram i.e 18.40% approx. The Lower authorities have totally ignored the fact that, as per established norms, value of gold ornaments should be reduced by 14 to 20 percent of ruling rates of gold to consider wastage/damages and also that certain other metals like copper, silver etc have to be used in making such ornaments.

3.19 Thus even on merits, the assessee company has sold jewellery to its sister concern at Fair Market Value.

3.20 Following case law relied upon by the Id CIT(A) are distinguishable:

- CIT vs. Inani Marbles (P.) Ltd [2009] 316 ITR 125 (Rajasthan)
- Ajay Goyal vs. ITO [2006] 99 TTJ 164 (Jodhpur – ITAT)
- ITO vs. Jai Construction Co, ITA No. 64/JU/2014 (Jodhpur – ITAT)

- Bhikha Ram Devrath vs. ITO, ITA No. 245/Jodh/2013 (Jodhpur – ITAT)

3.21 The facts of the present case are completely different. Assessee Company is engaged in the business of Jewellery since many years and maintained its books of accounts in the best possible manner, to an extent that not a single defect could be pointed out by the lower authorities. Ld. CIT(A) has misplaced his reliance on the case laws, as mentioned above and picked up lines, from the orders, suiting his requirements. Hon'ble Supreme Court in Sun Engineering Works (P.) Ltd. [1992] 198 ITR 297 (SC) held that each case has to be read in the factual background of the case.

3.23 Ld. CIT(A) did not provide any cogent reason for not following the ratio laid down by the various judgments put forth before him. In particular, Ld. CIT(A) has not dealt with the decision of Hon'ble ITAT Bangalore Bench in the case of Sphoorti Machine Tools (P.) Ltd. [2013] 30 taxmann.com 413 (Bangalore - Trib.). Ld. CIT(A) has misdirected himself in distinguishing the judgment of Hon'ble Jurisdictional High Court in Malani Ramjivan Jagannath [2009] 316 ITR 120 (Rajasthan). In the case at hand, no defects have been found in the opening stock, purchase, sales and closing stock. Mere doubt on the transaction with sister concern cannot constitute a "defect" in the books. Thus the judgment of Malani Ramjivan Jagannath (*supra*) is fully applicable in the assessee company's case.

In view of the above, Ld. CIT(A) has grossly erred in confirming the rejection of books of account and also confirming the trading additions of Rs. 1,04,49,607. Relief may please be give, by allowing appeal of the assessee company."

5. The Id DR has vehemently argued the matter and relied upon the orders of the lower authorities.

6. We have heard the rival contentions and perused the material available on record. In the instant case, the Assessing officer has invoked the provisions of section 145(3) whereby he has rejected the books of accounts and thereafter, has estimated the gross profit rate and made an addition of Rs 1,04,49,607. The reasoning of the Assessing officer, as emerging from the reading of the assessment order for such rejection of books of accounts, is that certain transaction of sale to a sister concern is not at arm's length and an adjustment is therefore required to be made. The Assessing officer thereafter came to a conclusion that as the accounts of the assessee do not present a true picture of the state of affairs, the books of accounts were rejected after invoking the provisions of section 145(3) of the Act. The questions that arise for consideration is what is the basis for the Assessing officer to come to a conclusion that the transaction of sale to a sister concern is not at arm's length. Secondly, where it is accepted that the transaction of sale to a sister concern is not at arm's length, are there any provisions in the Income tax Act where the Assessing officer is empowered by the Statute to substitute and replace the actual sale consideration with the arm's length sale consideration so determined. Thirdly, where there are no specific provisions where the Assessing officer is empowered by the Statute to substitute and replace the actual sale consideration with the arm's length sale consideration so determined, whether the Assessing officer can invoke the provisions of section 145(3) to reject the whole of the books of accounts of the assessee company and thereafter, make an assessment in the manner provided in section 144 of the Act.

7. During the course of assessment proceedings, the AO observed that the assessee has entered into an agreement dated 24.11.2009 with M/s KGK

Creation (I) Pvt. Ltd., which is a sister concern of the assessee company and in terms of the said agreement, the assessee has agreed to transfer to the purchaser company, the entire stock of raw material and finished goods valued at Rs. 6,64,62,716/-. An analysis was made by the AO in respect of 18ct gold of finished goods weighing 18.10337/- Kg which has been sold for Rs. 1,95,54,089/-. It was observed by the AO that the rate per gram works out to Rs. 1074.61 whereas the rate of pure gold on the date of such transfer was Rs. 1756/- per gram and rate of 18ct gold was accordingly worked out at Rs. 1317 per gram. The AO thus determined loss of Rs. 43,99,029/- in respect of the said transaction which has been held as not done at arm's length price. The basis for the Assessing officer to hold that the transaction of sale to a sister concern is not at arm's length is thus the comparison of 18ct gold rate as per agreement and as prevailing in the open market on the date of such sale transaction. If we look at the agreement dated 24.11.2009 entered into between the assessee company and its sister concern, M/s KGK Creations (India) Pvt Ltd, it states that the assessee company on its closure of business on this day of 24th November in the year 2009 transfer to purchaser entity, its entire stock in hand of 18 CT Gold Jewellery studded with diamonds & colour stones valued at Rs 5,49,53,487 and raw material i.e, diamonds & colour stones valued at Rs 1,15,09,229 for a total consideration of Rs 6,64,64,716. The transaction under consideration is therefore not sale of 18ct gold simpliciter but 18 CT Gold Jewellery studded with diamonds & colour stones. In order to determine whether the said transaction of sale of gold jewellery is at arm's length or not, the comparison should be of sale of gold jewellery studded with diamonds and colour stones to an unrelated third party. There is nothing on record to suggest any such comparative analysis and determination undertaken by the Assessing officer. The Id AR has stated at the Bar that the lower authorities have totally ignored the fact that, as per established norms, value of gold ornaments should be reduced by 14 to 20 percent of ruling rates of gold to consider wastage/damages and also that

certain other metals like copper, silver etc have to be used in making such ornaments. There is again no finding of the Assessing officer regarding such contentions raised by the Id AR. Without getting into merit of such contention, the fact remains that the transaction under consideration is sale of gold jewellery studded with diamonds and colour stones and not sale of gold simpliciter in form of gold coins or gold bars. The comparison therefore has to be in respect of same or identical transaction though with an unrelated third party which has not been done in the instant case. Further, there is nothing on record which suggest that the assessee company has received any sale consideration over and above what has been agreed and stated in the aforesaid agreement dated 24.09.2009. We are therefore of the view that the Assessing officer is not correct to hold that the transaction of sale of 18ct gold jewellery studded with diamonds and colour stones to its sister concern is not at arm's length having failed to carry out suitable comparative analysis of similar sale transaction with unrelated third parties.

8. Now, coming to the second issue, where for sake of arguments, it is accepted that the transaction of sale to a sister concern is not at arm's length, are there any provisions in the Income tax Act where the Assessing officer is empowered by the Statute to substitute and replace the actual sale consideration with the arm's length sale consideration so determined. In this regard, the Id AR has drawn our reference to the decision of the Hon'ble Supreme Court in the case of GlaxoSmithkline Asia (P) Ltd. (supra) and submitted that in that decision, the Hon'ble Supreme Court has observed that without domestic transfer pricing law finding place in the statute book, the tax authorities have no right to make adjustments regarding domestic sales made to sister concerns on the line of Transfer Pricing law for international Transactions. It was further submitted that in consonance with the said decision, domestic transfer pricing provisions were brought on the statute

books by the Finance Act, 2012 w.e.f. 01.04.2013 and even under these provisions, the sales to the associated enterprise in the present case is not covered. Further, drawing support from the decision of the Hon'ble Supreme Court in the case of CIT v. GlaxoSmithkline Asia (P) Ltd (supra), the Id AR has contended that the Hon'ble Supreme Court has also upheld the proposition of tax neutrality and in the instant case, the transactions between assessee company and its sister concern is "Tax Neutral" as both the entities are taxable at the same rate of 30.9% and there is no carry forward loss in any of the concerns, nor there is any issue of surcharge involved in any of the two companies. It was further submitted that the said transaction has been accepted in the hands of the sister concern by the same Assessing officer who exercises jurisdiction over the assessee company. Further, drawing support from the decision of the Hon'ble Supreme Court in the case of S.A. Builders Ltd. (supra), the Id AR has contended that the assessee company has all the right to sell its goods at a price, mutually negotiated, found prudent as a businessman and submitted that in the instant case, where there is no allegation of any receipt over and above the declared consideration, there is no basis with the Assessing officer to substitute and replace the actual sale consideration with the arm's length sale consideration so determined. We find force in aforesaid contentions so raised by the Id AR. The transaction is a tax neutral transaction as both the entities are profit making and chargeable at maximum marginal rate of 30.9%. In the instant case, even though the AO has computed a notional loss of Rs 43,99,029, no adjustment has been made to the sale consideration in the hands of the assessee company. Similarly, the purchase consideration arising out of the same transaction has been accepted by the Assessing officer who happens to exercise jurisdiction over both the entities. Further, we find that there is no specific provision which empowers the Assessing officer to make such an adjustment towards the sale consideration as held by the Hon'ble Supreme Court in case of CIT vs Glaxo Smithline (supra) which has subsequently been followed by the Hon'ble

Punjab and Haryana High Court in case of Saimbhi Cycles & Auto Industries (supra). Precisely for the said reasons, knowing very well that there are no specific provisions which empowers him to make the adjustment even though he has determined a notional loss of Rs 43,99,029, the Assessing officer did not make any adjustment towards such notional loss and went ahead and rejected the whole of the books of accounts invoking provisions of section 145(3) of the Act.

9. Now, coming to the third issue, given that there are no specific provisions where the Assessing officer is empowered by the Statute to substitute and replace the actual sale consideration with the arm's length sale consideration so determined, whether the Assessing officer can invoke the provisions of section 145(3) to reject the whole of the books of accounts of the assessee company and thereafter, make an assessment in the manner provided in section 144 of the Act. The Id CIT(A) has stated that as one main item of the trading account i.e. sales were found to be made not on the normal prevailing rate that too to a sister concern, then the AO was justified to invoke provision of section 145(3) of IT Act.

10. In this regard, we refer to the provisions of section 145(3) which provides that where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) has not been regularly followed by the assessee, or income has not been computed in accordance with the standards notified under sub-section (2), the Assessing Officer may make an assessment in the manner provided in section 144. In the instant case, the sale transaction has been duly recorded in the books of accounts, therefore, it is not a case of incomplete books of accounts of the assessee. It is also not a case of the Revenue that there has been a change in method of accounting regularly followed or income has not been computed in accordance with the notified standards. The question is where the Assessing

officer has determined sale of 18ct gold at lower than the normal prevailing market rate, can it be said that the books of accounts doesn't represent correct state of affairs and hence, the same can be rejected. In the instant case, we find that the assessee company has reported a total turnover of Rs 11,05,27,652 and out of that, sale consideration in respect of gold which has been questioned by the Assessing officer comes to Rs 1,94,54,089 which constitute 17.60% of total turnover. In other words, sale transactions representing 82.4% of the turnover has been accepted by the Assessing officer and still, the books of accounts have been rejected. Further, if we look at the agreement value of Rs 6,64,62,716 under which such sale transaction has happened, it constitute 29.27% of total transaction value which means that the remaining transaction value which constitute 70.73% has again been accepted by the Assessing officer. Further, on perusal of ledger account of sister concern in the books of the assessee company available in APB pages 23-28, it is noted that during the year, besides the subject transaction, there are other regular sales and purchase transaction running into crores of rupees which has been accepted by the Assessing officer. Further, the Assessing officer has not disputed the opening stock, purchases, sales and closing stock as reported by the assessee company. There is no evidence on record that the assessee company has received any sales consideration over and above what has been stated in the agreement and reported in the books of accounts. Assuming it was a case of closing stock and the assessee company has failed to value the stock taking into consideration the market value or cost price, whichever is less, we could have still appreciated the concern of the Assessing officer, however in the instant case, it is a case of actual sale and when the sale transaction has not been disputed and there is no material to prove that the assessee has received any consideration over and above the agreed consideration as reported in the financial statements, the actual sale consideration has to be accepted. In the above factual matrix, we find that the Assessing officer has merely proceeded on a premise that the sale of gold

is at a value lower than what is prevailing in the market. As we have stated above, the transaction under consideration is not sale of 18ct gold simpliciter but 18 CT Gold Jewellery studded with diamonds & colour stones. In order to determine whether the said transaction of sale of gold jewellery is at arm's length or not, the comparison should be sale of gold jewellery studded with diamonds and colour stones to an unrelated third party. There is nothing on record to suggest any such comparative analysis and determination undertaken by the Assessing officer. Further, it affirms our views, as we have stated above, that in absence of any specific provisions which empowers him to make the adjustment towards the notional loss of Rs 43,99,029, the Assessing officer went ahead and rejected the books of accounts invoking provisions of section 145(3) of the Act. In our view, such an approach of the Assessing officer which has been confirmed by the Id CIT(A) cannot be accepted. In light of the same, it cannot be said that the books of accounts doesn't represent correct state of affairs and hence, the same can be rejected invoking provisions of section 145(3) of the Act. Our decision is fortified by the decision of the Hon'ble Rajasthan High Court in case of Malani Ramjeevan Jagganath vs. ACIT (supra). Further, a similar view has been taken by the Coordinate Bench in case of DCIT vs Sphoorti Machine Tools (Supra) wherein it was held that the fact that the assessee has sold its products to its sister-concerns at a price lesser than the price at which the same product is sold to the third parties cannot be a ground for rejection of books of accounts. The facts in the instant case are on a stronger footing as there is no instance of sale to a third party at a higher price. The relevant findings of the Coordinate Bench are as under:

"11. We have given a careful consideration to the rival submissions. The primary condition for rejecting the book results as laid down under section 145 of the Income-tax Act, 1961 (the Act) is that the Assessing Officer should be satisfied that the books of account maintained by the assessee are not

complete and correct. As can be seen from the findings given by the Assessing Officer in the order of assessment, the Assessing Officer has merely proceeded on a surmise that the profits of the assessee are sought to be reduced by selling its products to M/s. Pragathi Automation P. Ltd., the assessee's sister-concern at a lesser price. There is no instance of falsity or incompleteness of the books of account pointed out by the Assessing Officer in the order of assessment. The books of account reflect the true state of affairs of the assessee. The fact that the assessee has sold its products to its sister-concerns at a price lesser than the price at which the same product is sold to the third parties, in our opinion, would not be a sufficient ground to come to a conclusion that the books of account of the assessee are not complete and correct. There is no evidence brought on record that over and above the price shown in the books of account, the assessee received something more from M/s. Pragathi Automation P. Ltd. As rightly contended on behalf of the assessee it is for the businessman to decide the price at which he has to sell its products to its customers. The law is well-settled that the Revenue cannot insist on the way in which businessmen should conduct his business. The Revenue cannot compel a businessman to sell its products at a particular price, so that the assessee derives maximum profit. The cost calculation, on which the Assessing Officer has placed reliance, has nothing to do with the completeness and correctness of the books of account of the assessee. There is one allegation by the Assessing Officer in the order of assessment (point j) that the sale of raw materials, blackening sales and labour charges sales not tallying with the books and details furnished by the assessee before the Assessing Officer in the course of assessment proceedings. This is a very vague allegation. The Assessing Officer has ultimately concluded that there is no clarity in figures submitted by the assessee and the books of account. This allegation on which the learned Departmental representative placed reliance, in our view, could not be sufficient to reject the book results. We agree with the conclusion of the

Commissioner of Income-tax (Appeals) that the Assessing Officer has proceeded on the assumption that something is amiss, only because the assessee had offered its products to its different customers at different rates. The Commissioner of Income-tax (Appeals) found that M/s. Pragathi Automation P. Ltd. was not claiming any tax exemption which necessitates the assessee shifting profits to M/s. Pragathi Automation P. Ltd. In the circumstances, when there is no evidence regarding incompleteness and incorrectness of books of account or facts sufficient to come to a conclusion that the assessee has attempted to defraud the Revenue, we are of the view that the conclusion drawn by the Commissioner of Income-tax (Appeals) are correct and do not call for any interference. Consequently, the appeal filed by the Revenue is dismissed.”

11. In light of above discussions and in the entirety of facts and circumstances of the case and respectfully following the legal authorities noted above, the action of the Assessing officer in rejecting the books of accounts under section 145(3) is set aside and the consequent action by way of additions so made by estimating GP rate than declared by the assessing company are hereby directed to be deleted.

In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 04/04/2018.

Sd/-

(विजय पॉल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Jaipur

Dated:- 04/04/2018

*Ganesh Kr

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Kothari Jewels Pvt. Ltd., Mumbai
2. प्रत्यर्थी / The Respondent- ACIT, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 455/JP/2015)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar.