



IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.5415/Mum/2016
(Assessment Year : 2012-13)

Tribhovandas Bhimji Zaveri & Brothers
Pvt. Ltd., Shop no.2, Nirmal Lifestyle
Mall, LBS Marg, Mulund, Mumbai 400080
PAN – AACCT4365L

..... Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle-15(3)(1), Mumbai

..... Respondent

Assessee by : Shri Anant N. Pai
Revenue by : Shri V. Vidhyadhar

Date of Hearing – 11.04.2018

Date of Order – 08.06.2018

ORDER

PER SAKTIJIT DEY, J.M.

Aforesaid appeal by the assessee is against order dated 30th June 2016, passed by the learned Commissioner (Appeals)-24, Mumbai, for the assessment year 2012-13.

2. In grounds no.1 and 2, assessee has challenged disallowance of ₹ 3,15,069, under section 43B of the Income Tax Act, 1961 (for short "*the Act*").

3. Brief facts are, during the assessment proceedings the Assessing Officer found that as per the audit report in Form no.3CD, employees contribution to ESIC and Provident Fund (PF) were not paid within the due date under the relevant Acts as provided under section 36(1)(va) of the Act. Therefore, he called upon the assessee to explain why such payment claimed as deduction should not be disallowed. Though, the assessee objected to the proposed disallowance, however, rejecting the claim of the assessee the Assessing Officer disallowed ₹ 3,15,069, under section 43B of the Act. Though, the assessee challenged the aforesaid disallowance before the learned Commissioner (Appeals), however, it met with no success. Hence, the assessee came in appeal before the Tribunal.

4. We have considered rival submissions and perused materials on record. It is evident from the assessment order itself that, though, the assessee has not paid the employee's contribution to ESIC and PF within the due date prescribed under those Acts, however, it is a fact on record that it has made the payments before the due date of filing of return of income for the impugned assessment year as provided under section 139(1) of the Act. That being the case, as per the decision of the Hon'ble Jurisdictional High Court in CIT v/s Ghatge Patil Transports Ltd., [2014] 368 ITR 749 (Bm.), no disallowance under section 43B of the Act can be made. Accordingly, we delete the

disallowance made by the Assessing Officer and sustained by the learned Commissioner (Appeals). Grounds no.1 and 2 are allowed.

5. In ground no.3, assessee has called into question the exercise of power under section 251(2) of the Act by the learned Commissioner (Appeals) to enhance the income of the assessee.

6. Brief facts are, the assessee company, as stated by the Assessing Officer, is engaged in the business of jewellers, gold smiths, silver smiths, gem and diamond merchandise, etc. For the assessment year under dispute, the assessee filed its return of income on 15th September 2012, declaring total income of ₹ 69,98,380. Assessment in case of the assessee was completed under section 143(3) of the Act vide order dated 21st March 2015, determining total income at ₹ 74,19,990, after certain disallowances. The assessee challenged the disallowances made by the Assessing Officer before the first appellate authority.

7. In course of proceedings before him, the learned Commissioner (Appeals) on perusing the details available in the assessment record found that the stock summary submitted by the assessee for the period 1st April 2011 to 31st March 2012 revealed grave anomaly in the value of closing stock of diamond jewellery. He found that as per the statement of closing stock submitted before the Assessing Officer the

opening stock of diamond jewellery (Ct) was 1260.780 ct. valued at ₹ 4,91,70,420 at an average rate of ₹ 39,000 per carat. The purchase of diamond jewellery during the year of 1107.540 carat was shown at ₹ 9,53,86,780 at an average rate of ₹ 86,124=90 per carat. Sales of diamond jewellery of 966.300 carats was shown at ₹ 8,74,29,629 at the average rate of ₹ 90,478=76 per carat. Whereas, the closing stock of 1402.020 carat of diamond jewellery has been valued at ₹ 5,61,47,718 at an average rate of ₹ 40,042.58 per carat. The learned Commissioner (Appeals) observed, how the closing stock of diamond jewellery can be valued at ₹ 40,042=58 per carat as against purchase price of ₹ 86,124=90 per carat. The learned Commissioner (Appeals) observed, considering the fact that in jewellery business first-in-first-out (FIFO) method is followed, why it should not be treated that the entire purchase of 1107.540 carat was embedded in the closing stock of 1402.020 carat of diamond jewellery, hence, should not be valued at ₹ 86,124=90 per carat as against the value of closing stock of diamond jewellery shown at ₹ 40,042=58 per carat, which would result in enhancement of assessment to the tune of ₹ 5,10,38,012. Thus, he directed the assessee to show cause why the addition to that extent should not be made. Though, the assessee vehemently opposed the enhancement of its income both on the validity of exercise of power of enhancement as well as on merit, however, the learned Commissioner

(Appeals) rejecting the submissions / objections of the assessee enhanced the income by ₹ 5,10,38,012, alleging under valuation of the closing stock of diamond jewellery.

8. The learned Authorised Representative submitted, assessee is following a method of valuation of closing stock consistently, therefore, learned Commissioner (Appeals) was not justified in rejecting the accounting method followed by the assessee. He submitted, learned Commissioner (Appeals) having not pointed out any specific defect or deficiency in the books of account, the exercise of power under section 251 of the Act is invalid.

9. The learned Departmental Representative submitted, learned Commissioner (Appeals) having enhanced the assessment by complying to the provisions of section 251 of the Act, the validity of such enhancement cannot be challenged.

10. We have considered rival submissions and perused materials on record. Section 251 of the Act empowers the Commissioner (Appeals) to dispose off an appeal filed before him in the manner prescribed therein. As per section 251(1)(a) of the Act, while disposing off an appeal against an order of assessment learned Commissioner (Appeals) has the power to confirm, reduce, enhance or annul the assessment. However, sub-section (2) of section 251 of the Act

mandates that where the learned Commissioner (Appeals) proposes to enhance an assessment he shall not do so unless the assessee appellant is given a reasonable opportunity of show cause against such enhancement. Keeping in view the aforesaid statutory provisions, if we examine the facts of the present appeal it can be seen that in course of appellate proceedings, learned Commissioner (Appeals) on examining the assessment records found that as per the stock statement submitted by the assessee before the Assessing Officer there was discrepancy in valuation of closing stock of diamond jewellery. He found that while purchases and sales of diamond jewellery have been shown at a much higher value, however, the closing stock of diamond jewellery has been shown at a lesser value. Thus, prima-facie, he was of the view that there was under valuation of closing stock requiring enhancement of assessment. Therefore, in consonance with the power conferred under section 251(2) of the Act the learned Commissioner (Appeals) issued a show cause notice to the assessee to explain why the assessment should not be enhanced. It is also evident, in response to the show cause notice the assessee submitted its reply and after considering the reply of the assessee learned Commissioner (Appeals) decided the issue. Thus, from the aforesaid facts it is very much clear that while enhancing the assessment learned Commissioner (Appeals) has acted strictly in

accordance with the statutory mandate as provided under section 251(1)(a) and (2) of the Act. That being the case, the contention of the assessee that the exercise of power of enhancement is without jurisdiction cannot be accepted. This ground is dismissed.

11. In ground no.4, the assessee has challenged the addition of ₹ 5,10,38,012 representing under valuation of closing stock of diamond jewellery.

12. As discussed earlier, the learned Commissioner (Appeals) during the proceedings before him on examining the assessment records concluded that the assessee has undervalued the closing stock of diamond jewellery. Hence, he enhanced the income of the assessee by ₹ 5,10,38,012. Challenging the enhancement of income assessee is in appeal before us.

13. The learned Authorised Representative submitted that the purchase value of diamond jewellery shown in the stock statement includes loose diamond, gold, platinum, making charges, etc. as some times the assessee purchases jewellery where diamond is embedded in gold and platinum. Whereas, the opening stock and closing stock shown in the stock statement consists of lose diamonds only. The learned Authorised Representative referring to the stock statement submitted that the opening stock shown by the assessee is more than

his sales. Therefore, there was no necessity for the assessee to purchase 1107.540 carat of diamond jewellery @ ₹ 86,124=90 to keep it in the closing stock and in the process block the capital of ₹ 9,53,86,780, unless, the opening stock is not sellable as per customer's preference and is slow moving item. He submitted, the very fact that even after availability of opening stock of diamond jewellery the assessee purchased 1107.540 carat of diamond jewellery suggests that the opening stock is of slow moving item. Therefore, the correct method of closing stock valuation is last-in-first-out (LIFO) which has been followed by the assessee. He submitted that the learned Commissioner (Appeals) has neither faulted closing stock quantity nor stock tally submitted by the assessee. Therefore, non-submissions of stock tally in audit report is immaterial. He submitted, the method of accounting to be followed is at the option of the assessee and the Department unilaterally cannot alter the method of accounting consistently followed by the assessee, unless, there are cogent evidence on record that profits cannot be deduced correctly from the method of accounting followed by the assessee. The learned Authorised Representative submitted, the purchase figures include cost of item other than diamond like gold, platinum etc. This fact has not been appreciated by the learned Commissioner (Appeals). In support of his submissions, the learned Authorised Representative placed

reliance on certain invoices filed before us. Thus, it was submitted there is no undervaluation of closing stock as suggested by the learned Commissioner (Appeals).

14. The learned Departmental Representative strongly relied upon the observations of the learned Commissioner (Appeals).

15. We have considered rival submissions and perused materials on record. As could be seen from the impugned order of the learned Commissioner (Appeals), on verifying the stock statement submitted by the assessee before the Assessing Officer he has concluded that the valuation of closing stock of diamond jewellery at the average rate of ₹ 40,042=58 per carat is on a much lower side considering the fact that the purchase of diamond jewellery have been shown at average rate of ₹ 86,124=90 per carat. It is further evident, the learned Commissioner (Appeals) stating that as per normally accepted principle valuation of stock of jewellery business is done by FIFO method. Thus, he has assumed that the entire purchases of diamond jewellery by the assessee during the year forms part of closing stock shown by the assessee. Further, it is evident, against the show cause notice issued by the learned Commissioner (Appeals) the assessee has submitted that while the opening and closing stock consist of loose diamonds only, the purchases and sales include largely diamond jewellery set in

gold and platinum. In support of such claim, the assessee has also furnished few invoices. The learned Commissioner (Appeals) has rejected the aforesaid claim of the assessee on the reasoning that the auditors have failed to provide the details of raw materials, finished products and other quantitative details. He has also observed that the assessee has not furnished any details to substantiate its claim that the purchases and sales shown in the stock statement include diamond jewellery set in gold and platinum and opening and closing stock consist of only loose diamond. In the process, he has also refused to accept the evidences submitted by the assessee in the form of invoices. Thus, as can be seen from the aforesaid facts, the learned Commissioner (Appeals) alleging lack of evidence being furnished by the assessee has adopted the average purchase value of diamond jewellery at ₹ 86,124=90 per carat to arrive at the value of the closing stock shown by the assessee. However, as rightly pointed out by the learned Authorised Representative, purely on conjecture and surmises it cannot be assumed that the entire purchases made during the year were embedded in the closing stock and nothing from such purchases were sold during the year. In this context, the contention of the learned Authorised Representative that there was no necessity for the assessee to purchase new stock due to availability of opening stock if he was not going to sell them immediately, appears logical. The very

fact that in spite of having opening stock of 1260.780 ct. of diamond jewellery the assessee purchased diamond jewellery of 1107.540 during the year, to some extent, justifies assessee's claim that the opening stock consists of slow moving items. However, the onus is on the assessee to co-relate the purchases made during the year with the sales as well as the closing stock with supporting evidences. As could be seen, the undervaluation of closing stock was made an issue only at the first appeal stage and was never examined by the Assessing Officer. Therefore, to provide an opportunity to the assessee to justify the valuation of closing stock of diamond jewellery we restore the issue to the Assessing Officer for fresh adjudication after due opportunity of being heard to the assessee. It is open to the assessee to furnish further evidence, if required, in support of its valuation of closing stock. Since, in the peculiar facts of the present case we have restored the issue to the Assessing Officer for fresh adjudication, it is not necessary to deal with the case laws cited before us. With the aforesaid observations, this ground is allowed for statistical purposes.

16. In ground no.5, the assessee has made a without prejudice claim of giving consequential effect to the opening stock of diamond jewellery of the subsequent year, if the enhancement in the value of closing stock is upheld in the impugned assessment year.

17. In view of our decision in ground no.4, raised by the assessee, this issue is also restored back to the file of the Assessing Officer for considering afresh, if warranted, depending upon the decision to be taken on the issue of valuation of closing stock of diamond jewellery as directed by us. This ground is allowed for statistical purposes.

18. In the result, assessee's appeal is partly allowed for statistical purposes.

Order pronounced in the open Court on 08.06.2018

**Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER**

**Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER**

MUMBAI, DATED: 08.06.2018

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury
Sr. Private Secretary*

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai