

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।  
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.2463/PUN/2016

निर्धारण वर्ष / Assessment Year : 2010-11

The Deputy Commissioner of Income Tax,  
Circle – 1, Jalgaon

.....अपीलार्थी / Appellant

**बनाम / V/s.**

M/s. R.L. Jewells Pvt. Ltd.,  
169, Balaji Peth, Johari Bazar,  
Jalgaon – 425001

PAN : AAECR2887F

.....प्रत्यर्थी / Respondent

Assessee by : Dr. Sunil Pathak  
Revenue by : Dr. Vivek Aggarwal

सुनवाई की तारीख / Date of Hearing : 28-06-2018

घोषणा की तारीख / Date of Pronouncement : 08-08-2018

**आदेश / ORDER**

**PER VIKAS AWASTHY, JM :**

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-2, Nashik dated 09-08-2016 for the assessment year 2010-11.

2. The Revenue in appeal has assailed the findings of Commissioner of Income Tax (Appeals) on the following grounds :

- “1. On facts and in circumstances of Law, the Ld. CIT(A) has erred in deleting the disallowance made u/s 40A(2)(a) of the Income Tax Act, 1961 and thus also failed in appreciating the fact thereto that disallowance u/s 40A(2)(a) was made by the then AO's after considering the facts of the case and quoting the substantial reasons for adopting the rate of 'Bombay Bullion Association'.
2. On the facts and circumstances of the case and in law, the order of the Ld. CIT(A)-II, Nashik be cancelled on the above issue and that of the A.O. be restored.
3. The appellant craves leave to add, alter, modify, delete, amend any of the grounds with prior permission of the Ld. Pr. CIT, as per the circumstances of the case.
4. The appellant prays to file any of the additional evidence, with the permission of Ld. Pr. CIT, appropriate to the grounds taken in appeal.”

3. The brief facts of the case as emanating from records are : The assessee is engaged in manufacturing and trading of gold, silver, diamond ornaments/jewellery. During the course of scrutiny assessment proceedings, the Assessing Officer inter alia made addition/disallowance of Rs.1,37,06,504/- u/s. 40A(2)(a) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”). In First Appellate proceedings the Commissioner of Income Tax (Appeals) deleted the addition on the basis of remand report from the Assessing Officer dated 28-06-2016 and the order of Tribunal in the case of assessee's sister concern DCIT Vs. M/s. Rajmal Lakhchand in ITA No. 607/PN/2013 for assessment year 2009-10 decided on 16-01-2015. Now, the Revenue is in appeal before the Tribunal.

4. Dr. Sunil Pathak appearing on behalf of the assessee submitted at the outset that the solitary issue raised by the Department in appeal has been decided by the Co-ordinate Bench of the Tribunal in the case of assessee's sister concerns. The ld. AR submitted that the assessee has adopted Jalgaon rates (local rates) for valuation of gold/silver jewellery for making payments to sister concerns. Whereas, the Assessing Officer applied Bombay Bullion Association rates. There is difference in rates of gold and silver in Jalgaon and Bombay. Therefore, there was mismatch in

the figures furnished by the assessee for the purchase and sale of ornaments and the figures adopted by the Assessing Officer. The Tribunal in the case of sister concerns of the assessee has held that the Jalgaon rates are to be applied. In support of his submissions the ld. AR furnished a copy of the order of Tribunal in the case of Rajmal Lakhichand Jewellers Pvt. Ltd. Vs. Jt. Commissioner of Income Tax in ITA No. 672/PUN/2015 for assessment year 2010-11 decided on 07-03-2018 and the copy of order of Tribunal in the case of R.L. Gold Pvt. Ltd. Vs. Dy. Commissioner of Income Tax in ITA No. 1702/PUN/2014 for assessment year 2009-10 decided on 17-02-2017. The ld. AR submitted that in both the above cases the Tribunal has deleted the addition made u/s. 40A(2) of the Act.

4.1 The ld. AR also furnished a copy of the remand report dated 28-06-2016 wherein the Assessing Officer has admitted that by applying local Jalgaon rates no excessive payments have been made by the assessee to the sister concerns for the purchase of ornaments.

5. Dr. Vivek Aggarwal representing the Department fairly admitted that the issue raised by the Department in appeal is identical to the one adjudicated by the Tribunal in the case of assessee's sister concerns.

6. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The primary issue in the appeal by Revenue is against deleting of disallowance u/s. 40A(2)(a). The Assessing Officer made disallowance u/s. 40A(2)(a) on account of alleged excessive payments made by the assessee to its sister concerns for purchase of gold ornaments. The additions were made by the Assessing Officer by applying Bombay Bullion Association rates as against Jalgaon rates adopted by the assessee. We find that similar additions /

disallowances were made in the case of sister concerns of the assessee. The Co-ordinate Bench of the Tribunal upheld the findings of Commissioner of Income Tax (Appeals) in deleting such disallowances. For the sake of completeness relevant extract of the findings of Tribunal in the case of flagship concern of the assessee DCIT Vs. M/s. Rajmal Lakhichand in ITA No. 607/PN/2013 (supra) are reproduced here-in-below :

*“8.27 We now deal with the applicability of the provisions of section 40A(2)(b) of the Act. In this case, the assessee has entered into the transactions with the group entities. Hence, prima-facie the proposition are applicable. There is no dispute about this legal position but the core question is whether the assessee has paid excess price than the market rate to the related parties or to the sister concerns for the purchase of the bullion (99.50-standard gold). As per the argument of the Ld. Counsel for the assessee, even if there is a marginal difference in the market price of the Mumbai and the Jalgaon but that prices are covered in the transportation and delivery. The assessee has filed a chart at pages 42 to 55 of paper book No.1 in which assessee has given names of the sister concerns, gold weight, rate paid, total value, sales, Jalgaon rate on the same day and the Mumbai rate. As per the said chart on 09-04-2008 for the standard gold- (99.50), the assessee has paid Rs.12400/ 10 gms when the Jalgaon rate was Rs.11805/ 10 gms. Hence, there is a difference of Rs.595/- . So assessee has made excess payment. The assessee has also given examples on 03-05- 208 and 06-05-2008, as per the chart compared to the even local market the assessee has made the payment in excess of the local market rates. Immediately thereafter assessee has given the sample examples on 08-05-2008, 26-05-2008 in respect of the gold purchases from sister concerns R.L. Gold Pvt. Ltd., Rajmal Lakhichand and sons, Rajmal Lakhichand Jewellers Pvt. Ltd., Manraj Jewellers Pvt. Ltd., etc. As per the figures given by the assessee, the assessee has paid the price which is less than the market rate. On the perusal of the said chart, we find that on some occasions, on some dates, there is excess payments and on some dates, there is lesser payment. As per the transactions given in the chart, it is seen that if we consider the total transactions in a year, i.e. purchase of the bullion from the sister concerns, it is seen that the assessee has paid less amount to the extent of Rs.1,01,14,553/- if we go with the theory of the AO, i.e., comparing the local market rate of Jalgaon and rates declared by the Mumbai Bullion Association. So far as the AO is concerned, he has adopted the short cut method without understanding the trading in the bullion and fluctuations in the market in the prices and worked out the average rate by comparing the*

same transaction on same dates and accordingly worked out the alleged difference. In our opinion, the approach of the AO is totally erroneous as he has totally discarded the trading in the bullion that takes place. He has also not considered the statement of the assessee that there are variations and fluctuations in the bullion market and even in the intra day transactions rate can be changed and sometimes rates may be stable and rates may swing like a wind.

8.28 When the matter reached before the Ld.CIT(A) though he did not agree with the approach of the AO but he also made the same mistake. He has again gone on the average method adopted by the AO. In this case it is also considered by the assessee that many of the intra entity transactions are not correct or fictitious and that is also clear even from the chart and figures given by the Ld.CIT(A) in his order in respect of the transactions between the assessee and intra group entities. Another aspect to be considered here is that assessee is a very old firm in the gold market but in the preceding two years span the turnover of the assessee has exceeded 11.5 times from 82.55 crores in A.Y. 2007-08 to 955.78 crores in A.Y. 2009- 10. The assessee has given the justification of the same. Fictitious transactions were shown for inflating the turnover of the assessee. The argument of the Ld. Counsel for the assessee is that it was done to facilitate to obtain the finance. It is pertinent to note here that assessee has filed the chart showing the loans availed by the assessee and other group concerns, which is placed at pages 711 to 714 of the paper book. The assessee was enjoying the CC limit of Rs.5.56 crores. At the same time, the other group concerns/sister concerns were enjoying the CC limit of Rs.52.81 crores. The assessee has also filed a letter dated 25-04-2008 of the SBI (page 712 of paper book) in which one of the group concerns M/s. R.L. Gold Pvt. Ltd. has obtained a gold loan under the domestic jewellery industry scheme from the SBI to the extent of 30 kg. It also supports the case of the assessee that with the meager cash credit limit of Rs.5 crore the assessee by no stretch of imagination can reach to the turnover of Rs.955 crore. As per the statistics given by the Ld.CIT(A) in his order, it is seen that there is high frequency of transactions between the assessee and intra group entities. Even in some of the cases bullion is purchased and sold either on the same date or immediately on the next day. If the assessee has not earned any income, then can it be taxed is another question. For invoking the provisions of section 40A(2)(b) the AO has to establish that the payment made to the related party is not reasonable at all considering the local market conditions. In our opinion both the authorities below have not at all considered the local conditions of the gold market. The method of average price of the year in our opinion is not the correct method to determine the reasonableness of the amount paid for purchasing the bullion

from the sister concerns for the reasons narrated herein above that there is variation in the price of the bullion. We also find from the chart filed by the assessee that the assessee has paid lesser price in some cases as compared to the local market and Mumbai market to the sister concerns. But that is not considered by both the authorities below. When the average price method is adopted, then where ever there is a lesser price paid that is also to be considered and not the excess price only. In our opinion, the average price method adopted by both the authorities is totally erroneous considering the market conditions of the bullion.

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8.32 We also find that again while making the addition in respect of sale of ornaments to the group concerns/sister concerns, both the authorities below have adopted the comparison formula based on the sale of ornaments to the unrelated parties and sale of ornaments to the related parties. It is stated that if the average price is taken then the assessee has charged Rs.10,350/10 gms on the sale to the sister concerns as against the average price of Rs.13,906/10 gms charged to the third parties/unrelated parties on the sale of gold ornaments. The AO has worked out the difference of Rs.40.96/gm but the Ld.CIT(A) has worked out the difference at Rs.55.60/gm. The Ld.CIT(A) has also observed that unlike section 40A(2)(b) of the I.T. Act, there is no provision even if there is a sale at lower price comparing with the prevailing market prices of the commodity or goods. In our opinion as far as the issue of ornaments is concerned, approach of both the authorities below adopting the average price formula is not correct. As far as the ornaments are concerned, the price may vary from design to design, from item to item, from purity of gold etc. In case of the ornaments normally the sales are made from the 916 touch (22 karat). The ornaments may be of 18karat, 20 karat and 21 karat also. We cannot take the average price of the ornaments to the entire sale of the year as different factors are also involved as mentioned above which changes the price of the ornaments. Moreover, there may be variation in the labour charges also. Hence, we do not agree with the average price formula adopted by both the authorities below for making the addition of Rs.12,01,63,323/- on alleged selling of the ornaments to the sister concerns at lower price than the price charged to the unrelated parties.

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8.34 xxxxxxxxxxxx

8.35 In the light of our above discussion, we are of the opinion that approach of both the authorities below is not correct for making high pitch additions in the hands of the assessee by invoking provisions of section 40A(2)(b) and for alleged selling of the ornaments to the related entities at a lower price. As per the financial accounts of the assessee, the GP worked out at 1.13%. The possibility of purchasing the bullion and ornaments from the group entities at a higher price cannot be ruled out even though there is no strict proof against the assessee. Even the exercise done by both the authorities below is not based on any scientific method. We therefore are of the opinion that adoption of GP rate of 1.20% as against 1.13% disclosed by the assessee will meet the ends of justice. We hold and direct accordingly. We accordingly set-aside the order of the Ld.CIT(A) and direct the AO to work out the GP @1.20% on the total sale of Rs.955,78,81,767/- as per audited accounts. After reducing the GP declared by the assessee at Rs.10,79,15,449/-, the balance GP is to be added to the total income of the assessee. This covers the grounds on the addition made by invoking provisions of section 40A(2)(b), i.e. purchase of bullion from the sister concerns/related entities by paying higher price as well as sale of the ornaments at lower price. Accordingly, the relevant grounds taken by the assessee are partly allowed and the grounds of appeal No. 1 and 2 by the Revenue are dismissed.”

7. It is an admitted fact that there is no change in the facts and the nature of transactions are identical. We further observe that similar disallowances were made in the case of other sister concerns of the assessee viz. Rajmal Lakhichand Jewellers Pvt. Ltd. and R.L. Gold Pvt. Ltd. The matter travelled up to the Tribunal and the Tribunal in the cases of Rajmal Lakhichand Jewellers Pvt. Ltd. Vs. Jt. Commissioner of Income Tax (supra) and R.L. Gold Pvt. Ltd. Vs. Dy. Commissioner of Income Tax (supra) has deleted the disallowances u/s. 40A(2) of the Act.

8. We further observe that the Assessing Officer in the remand report has accepted that after applying local rates, the assessee has not made any excessive payments to the sister concerns for the purchase of ornaments. The local rates as published in the local Newspapers have been compared with the rates applied by the assessee and on verification it is found to be

in order. Thus, the Assessing Officer accepted that no excessive payments were made by the assessee to its sister concerns. Under such circumstances disallowance u/s. 40A(2)(a) is uncalled for.

In view of the above facts, we do not find any infirmity in the order of Commissioner of Income Tax (Appeals). Accordingly, the same is upheld and the appeal of Revenue is dismissed being devoid of any merit.

9. In the result, the appeal of the Revenue is dismissed.

Order pronounced on Wednesday, the 08<sup>th</sup> day of August, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 08<sup>th</sup> August, 2018

RK

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-2, Nashik
4. The Pr. Commissioner of Income Tax-2, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune