



IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI SANDEEP GOSAIN, JM

ITA No.3305/Mum/2017

(Assessment Year :2011-12)

Dy. Commissioner of Income Tax 5(3)(1), Room No.519, Aayakar Bhavan 5 th Floor, Mumbai – 400 020	Vs.	M/s. Sanghavi Exports International Pvt. Ltd., CE-4011, 4012, 4013, Diamond Bourse, Bandra Kurla Complex Bandra (E) Mumbai – 400 051
PAN/GIR No.		AAKCS7350N
Appellant)	..	Respondent)

ITA No.3375/Mum/2017

(Assessment Year :2011-12)

M/s. Sanghavi Exports International Pvt. Ltd., CE-4011, 4012, 4013, Diamond Bourse, Bandra Kurla Complex Bandra (E) Mumbai – 400 051	Vs.	Dy. Commissioner of Income Tax 5(3)(1), Room No.519, Aayakar Bhavan 5 th Floor, Mumbai – 400 020
PAN/GIR No.AAKCS7350N		AAKCS7350N
Appellant)	..	Respondent)

Revenue by	Shri V. Justin
Assessee by	Shri Suchek Anchaliya
Date of Hearing	28/05/2018
Date of Pronouncement	21/08/2018

आदेश / O R D E R

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

These are the cross appeals filed by the assessee and Revenue against the order of CIT(A)-10, Mumbai dated 16/01/2017 for A.Y.2011-12 in the matter of order passed u/s.143(3) of the IT Act.

2. Grievance of assessee and Revenue relates to addition made on account of alleged bogus purchases.
3. Rival contentions have been heard and record perused.
4. The facts of the case, in brief, are that the assessee company is engaged in the business of import, export and manufacturing of cut & polished diamonds. It furnished its return of income for the A.Y.2011-12 on 29/11/2011 declaring total income of Rs.20,64,43,122/- and book profit as per sec.115JB(2) is computed at Rs.22,44,62,158/-. On scrutiny notice u/s 143(2) was issued and served upon the assessee. The AO passed order u/s 143(3)(ii) on 31/03/2015. In the assessment order AO observed that information has been received from the Investigation Wing of the Department, Mumbai, that the assessee company has taken purchase bills from 11 concerns operated By Shri Bhanwarlal Jain Group.
5. Before the AO, the assessee submitted that they do not know the person named "Bhanwarlal Jain" and not done any business transaction of whatsoever nature with Mr. .Bhanwarlal Jain. The AO did not accept the contention of the assessee on the plea that Shri Bhanwarlal Jain has admitted in the statement that they are not doing any genuine business concerns floated by them. Thereafter, AO worked out peak credit of alleged purchases and made addition u/s.69C of the IT Act.
6. Before the CIT(A) it was contended by assessee that the AO erred in making an addition on account of unexplained purchase u/s 69C of the

Act by calculating peak credit and by treating genuine purchase as accommodation entry. The AO erred in treating the genuine purchases as accommodation entry without appreciating the fact that the assessee had purchased the goods with actual delivery and used for manufacturing purpose, which was later on exported through India Customs Department. The AO erred in applying the peak without appreciating the fact that the payment thereof is made through cross a/c payee cheque only and there is no corroborative evidence of payment of purchase otherwise than by cross account payee cheque or banking channel. The AO erred in making the addition of genuine purchase solely on the basis of statement of Shri Bhanwarial Jain given before Investigation Wing, Mumbai without providing copy of statement and cross examination to the assessee.

7. By the impugned order CIT(A) declined the theory of peak credit and the addition made by AO u/s.69C of I.T.Act. However he restricted the addition to the extent of 3% of alleged bogus purchases after observing that even though Bhanwarlal Jain in his statement has not mentioned the name of assessee, they have given the name of various concerns in whose names the invoices were given to the assessee. The CIT(A) further observed that the assessee has submitted following details for purchase of goods from various concerns to prove genuineness of the purchase transactions.

- Ledger account with confirmation of parties mentioned in show cause notice.
- Copies of purchase bills.

- Stock Register/ Quantitative Details.
- Bank statement duly marked showing payment made to these parties.

8. Thus, the addition so made was reduced by CIT(A) to the extent of 3% of the alleged bogus purchases. Against this order of CIT(A) both assessee and Revenue are in appeal before us.

9. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also considered judicial pronouncements referred by the AO and CIT(A) as well as cited by learned AR before us in the context of factual matrix of the case. From the record we found that assessee company is engaged in the business of import, export and manufacturing of cut and polished diamonds. During the course of scrutiny assessment, AO got information from Investigation Wing of the Department that assessee company was taking bogus bills with regard to the purchases so made.

10. From the record we found that on the allegation of AO regarding alleged bogus purchases, the assessee has asked / requested the AO for the following:-

- *Copy of Statement, if any recorded of any parties relied upon by the A.O.*
- *Any corroborative evidence to justify the claim of A.O that the assessee has taken the accommodation entries from above mentioned party.*
- *Cross examination of Bhanwarlal Jain*
- *Cross examination of Partner/Proprietor of above concerns from whom assessee has purchased the goods.*

- *Allow the assessee to produce the Partner/Proprietor of the purchase parties of the above mentioned concerns before the A.O to prove genuineness of the transaction of purchase of goods from above party.*

11. The Ld. A.O. has not acceded to the request of assessee nor considered the documents submitted by the assessee and also not provided the opportunity for Cross examination of Bhanwarlal Jain and /or Partner/Proprietor of the purchase parties. AO made the addition by applying the peak theory solely on the basis of the statement of Shri Bhanwarlal Jain given before Investigation Wing, Mumbai without any corroborative evidence and on the basis of guess and estimation.

12. It is crystal clear that AO has made addition u/s.69C as unexplained expenditure. The basic idea behind the peak credit theory is that where a single credit or number of credit appear in the books in the account of any particular person side by side with a number of debits, they should all be arranged in serial order, that a credit following a debit entry should be treated as referable to the latter to the extent possible and that, not the aggregate but only the "peak" of the credits should be treated as unexplained. Following the above principal, The Ld. A.O. made the addition u/s 69C of the Act of peak credit of alleged purchase in the total income of the assessee. Since payment of all purchases was made by cheque and confirmation from the respective suppliers was filed, there is no merit in the addition so made u/s.69C. However, the CIT(A) also did not accept the addition made by the AO u/s.69C, but he restricted the addition at 3% of the amount of alleged bogus purchases.

13. From the record, we also found that before the lower authorities, the assessee has filed the following documents to prove the genuineness of purchase transaction.

- *Account Confirmation of purchase parties.*
- *ITR Acknowledgement of purchase parties.*
- *Audited Financial Statement of purchase parties.*
- *Bank Statement of purchase parties.*
- *Copy of Invoices of purchase parties*
- *Confirmation of purchase party*

14. From the trading account placed on record, we observe that assessee has declared profit rate of 7.17% of the sales which is quite reasonable and in consonance with normal profit rate shown in the diamond industry. The Ld. CIT (A) has summarily rejected the argument placed by the assessee relating to the following request made by the assessee before the Ld. A.O., which the Ld. A.O. did not provide:

1. *Copy of statement of Bhanwarlal Jain.*
2. *Copy of statements of parties, if any.*
3. *Cross examination of Bhanwarlal Jain.*
4. *Cross examination of parties if any who had given the statement.*
5. *Any corroborative evidence to prove that the appellant has purchased goods from grey market.*
6. *Purchase parties are available and can be produced before the ld. AO or the Ld. AO can issue summon u/s.131 of the Act to verify the genuineness of purchase.*

15. Hon'ble Bombay High Court in the case of Nikunj Eximp Enterprises (P) Ltd., (2013) 35 Taxmann.com 384 have observed that the addition made by relying on some statement or document without giving opportunity to the assessee to cross examine, the parties on whose statement addition has been made is not

sustainable in law. Hon'ble Supreme Court in the case of Andaman Timber Industries 281 CTR 241 has held that not allowing assessee to cross-examine witnesses by adjudicating authority though statements of those witnesses were made as basis of impugned order, amounted in serious flaw which made impugned order nullity as it amounted to violation of principles of natural justice. The precise observation of the Hon'ble Supreme Court was as under:-

“Not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above.”

16. Similar view has been taken by the Jurisdictional High Court in the case of H.R.Mehta in its order dated 07/07/2016. The Hon'ble High Court held as under:-

“The assessee is bound to be provided with the material used against him apart from being permitted to cross examine the deponents. The denial of such opportunity goes to root of the matter and strikes at the very foundation of the assessment order and renders it vulnerable.”

17. In the instant case, assessee has precisely asked for cross examination and the copy of the statement which was not supplied either by AO or by CIT(A) nor any corroborative evidence was brought on record to prove that assessee has purchased goods from grey market. Keeping in view the profit rate shown by the assessee at 7.17% in respect of goods exported, there is no justification for making further addition of 3%. It is also a matter of record that assessee has filed ledger account with confirmation of the parties from whom purchases were made. Stock Register and quantitative details of the goods purchased and exported was also filed before the lower authorities, wherein no discrepancy was pointed out. Keeping in view totality of facts and circumstances of the case vis-à-vis profit declared by the assessee at 7.17%, no further addition is warranted.

16. In the result, appeal of the Revenue is dismissed whereas appeal of the assessee is allowed.

Order pronounced in the open court on this 21/08/2018

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

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

Mumbai; Dated 21/08/2018

Karuna Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai