

**आयकर अपीलीय अधिकरण “E” न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI**

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष ।

**BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM**

**आयकर अपील सं./ ITA No. 273/Mum/2009**

(निर्धारण वर्ष / Assessment Year 2003-04)

B. Arvindkumar & Co. 107-E, Pancharatna, M.P. Marg, Opera House, Mumbai- 400 004	Vs.	Income Tax Officer Ward-16(3)(4), Matru Mandir, Tardeo Road, Mumbai-400 007
<b>(अपीलार्थी / Appellant)</b>	..	<b>(प्रत्यर्थी / Respondent)</b>
<b>स्थायी लेखा सं./PAN No. AAafb1069L</b>		

**आयकर अपील सं./ ITA No. 5979/Mum/2009**

(निर्धारण वर्ष / Assessment Year 2003-04)

B. Arvindkumar & Co. 107-E, Pancharatna, M.P. Marg, Opera House, Mumbai- 400 004	Vs.	Dy. Commissioner-16(3) Mumbai-16(3) Matru Mandir, Tardeo Road, Mumbai-400 007
<b>(अपीलार्थी / Appellant)</b>	..	<b>(प्रत्यर्थी / Respondent)</b>

**आयकर अपील सं./ ITA No. 5899/Mum/2009**

(निर्धारण वर्ष / Assessment Year 2003-04)

Dy. Commissioner of Income Tax-16(3) Room No. 206, Matru Mandir, Tardeo Road, Mumbai-400 007	Vs.	B. Arvindkumar & Co. 107-E, Pancharatna, M.P. Marg, Opera House, Mumbai-400 004
<b>(अपीलार्थी / Appellant)</b>	..	<b>(प्रत्यर्थी / Respondent)</b>

अपीलार्थी की ओर से / <b>Appellant by</b>	:	Shri Niraj Sheth, AR
प्रत्यर्थी की ओर से / <b>Respondent by</b>	:	Shri DG Pansari, DR

**सुनवाई की तारीख / Date of hearing:** 17-09-2018



घोषणा की तारीख / Date of pronouncement :	28-09-2018
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### आदेश / ORDER

#### PER MAHAVIR SINGH, JM:

The first appeal is against the revision order passed by CIT-16, Mumbai vide order dated 28.03.2008 under section 263 of the Act, 1961 (hereinafter 'the Act') for AY 2003-04. The two cross appeals are arising out of the order of Commissioner of Income Tax (Appeals)-XVII, Mumbai [in short CIT(A)], in appeal No. CIT(A) XVII/IT-106/08-09, dated 27.08.2009. The Assessment was framed by the Dy. Commissioner of Income Tax, Circle-16(3), Mumbai (in short 'DCIT/ AO') for the A.Y. 2003-04 vide order dated 26.12.2008 under section 143(3) read with section 263 of the Income Tax Act, 1961 (hereinafter 'the Act').

2. At the outset, it is noticed that this appeal filed by assessee against the revision order passed by CIT(A), Mumbai under section 263 of the Act is delayed by 227 days. The learned Counsel for the assessee when pointed out, argued that the assessee has filed condonation petition along with affidavit of the partner of the firm namely Shri Bharat Malukchand Shah. The assessee admitted that the revision order passed by CIT(A) under section 263 of the Act dated 28.03.2008 was received by assessee on 02.04.2008 and appeal was filed before Tribunal on 13.01.2009 instead of due date of filing of appeal on or before 31.05.2008. Hence, there was delay of 227 days. The reasons for delay stated by the assessee was that the assessee was advised by his chartered accountant that the revision order passed by CIT(A) under section 263 of the Act was not appealable. The learned Counsel for the



assessee drew our attention the affidavit of the partner of the firm and the relevant para Nos. 3 to 5 of the affidavit reads as under: -

*“3. That subsequently, the Commissioner of Income Tax-XVI, Mumbai set aside the assessment made under section 143(3) of the Income-tax Act, 1961 and passed an order under section 263 of the Income Tax Act, 1961 dated 28 March 2008 which was received by me on 02 April 2008 and consequently the appeal to the Income tax Appellate Tribunal ought to have been filed by 31<sup>st</sup> May 2008 but was only filed on 13 January 2009 (i.e. after a delay of 227 days).*

*4. that even though I was aggrieved by the said order, I was under a bona fide relief given to me by the Firm's Counsel that the order of the Commissioner of Income-tax passed under section 263 of the Income-tax Act, 1961 is not appealable but only the order to be passed subsequently by the Assessing Officer was to be appealed against.*

*5. That subsequently, after the lapse of the time allowed for filing of the appeal, I learnt that the aforesaid order of the Commissioner of Income-tax is appealable and I therefore decided to file an appeal against the said order.”*

3. The learned Counsel for the assessee also stated that this Chartered Accountant, who advised assessee that the revision order passed by CIT(A) under section 263 of the Act is not appealable has filed affidavit. He drew our attention to the affidavit of Chartered Accountant, Shri Babulal Diyora and the relevant affidavit reads as under: -



“ I Mr. Babulal H. Diyora, aged about 75 years erstwhile proprietor of Messrs. Babulal Diyora & Co. Chartered Accountants (now operating as a partnership firm) hereby solemnly affirm that for the AY 2003-04, on or around 10<sup>th</sup> April 2008, on being asked by Mr. Bharat M Shah partner of Messrs. B. Arvindkumar and Co. a partnership firm- one of the clients of the said Messrs. Babulal Diyora & Co. regarding how to proceed against the Orders passed by the CIT under section 263 of the Income-tax Act, 1961, **I had informed him that against an order under section 263 of the Act, there are two remedies available (i) to file an appeal in the Income Tax Appellate Tribunal (ITAT) against the said order; (ii) to go before the Assessing Officer and agitate the case on merits and then file an appeal before the CIT(A) and then the ITAT if the assessee is aggrieved by the order of the Assessing officer or the CIT(A), as the case may be.**

**Upon the information given by me to him as stated in Para 1 above, the said Mr. Bharat M Shah asked me whether it was alright if the said Messrs. B Arvindkumar and Co. agitates its claim before the Assessing Officer as in remedy (ii) of para 1 above. To this question of Mr. Bharat M Shah, I did not inform him the advantages/ disadvantages of the two alternatives and replied in the affirmative. The appeal was supposed to be filed after receiving the order under section 263 of the Income Tax**



***Act, 1961, within 60 days of the receipt of the order. However advice was followed by our aforesaid client in a little different manner and the same was filed after receipt of the Order of the Assessing Officer in response to the order under section 263 of the Income Tax Act, 1961.***

*I further declare that the above statements are true and correct to the best of my knowledge and belief."*

4. The learned Counsel for the assessee was specifically drawn the attention of the advised of the chartered accountant, who clearly advised that filing of appeal before Income Tax Appellate Tribunal against the revision order passed under section 263 of the Act is one of the remedies. It means that from the above it is clear that the assessee was advised to file the appeal before ITAT against the revision order under section 263 of the Act and not that this is not appealable order as contended by the assessee's partner in his affidavit. The learned Counsel for the assessee filed copies of Tribunals order before us in the cases of HST Steel Private Limited vs. ACIT in ITA Nos. 592 & 593/Hyd/2013 vide order dated 20.12.2013, Malineni Babulu (HUF) vs ITO in ITA No. 1326/Hyd/2014 vide order dated 07.08.2015. But when it was pointed out to the learned Counsel that first of all assessee has to cross first hurdle regarding reasonable cause and after that case laws will come into play. He only insisted that the assessee was advised that this is not appealable order. But the facts states otherwise from the records and the affidavit of the chartered accountant that the assessee was advised at that point of time that filing of appeal before ITAT against revision order is one of the remedies and assessee has not considered fit to file the appeal before ITAT. In view of the above, we find that this delay of 227 days is without



any reasonable cause and hence, delay is not condoned. The appeal is dismissed in limine.

5. Coming to ITA No. 5899/Mum/2009 of Revenue's appeal and Cross Appeal of assessee in ITA No. 5979/Mum/2009. The only issue in these cross appeals, of assessee and Revenue, is as regards to the order of CIT(A) restricting / applying the gross profit rate at 8.68% as against 10.8% applied by AO, whereas assessee has disclosed the gross profit rate at 6.57%. For this Revenue has raised the following two grounds: -

*"1. The Id. CIT(A) erred in directing the AO to adopt the Gross Profit @ 8.68%, instead of 10.8%, thus granting relief of ₹ 57,09,913/- without appreciating the fact that the assessee has failed to justify the low margin profit with relevant supporting documentary evidences.*

*2. The Id. CIT(A) has himself admitted that the assessee has not fully explained the valuation of closing stock and the low yield and has also admitted the fact that the assessee's book result is not true and correct and has therefore erred in directing the AO to adopt the Gross Profit @ 8.68%."*

*Assessee has raised following ground No.1: -*

*"1. The learned The honourable Commissioner of Income Tax (Appeal) –XVII has erred in sustain the addition of ₹ 56,90,904/-. The said addition be deleted."*



6. Briefly stated facts are that the assessee is engaged in the business of import, export, re-sale and manufacturing of diamonds i.e. cut and polished diamonds. Original assessment was completed under section 143(3) of the Act on 27.02.2006 determining total income of ₹ 38,38,880/- against the returned income of ₹ 32,18,850/-. Thereafter, the CIT-16, Mumbai passed revision order under section 263 of the Act dated 28.03.2008, setting aside the original assessment and directed the AO to reassessed the income. The AO in lieu of revision order passed by CIT(A) under section 263 of the Act and giving consequential order, issued a questionnaire dated 01.05.2008 calling upon the assessee to submit the following details: -

*"i) Kindly explain as to why the books of accounts shall no be rejected in the light of the clear findings in your case by Commissioner of Income Tax (Appeals).*

*ii) Explain as to why best judgment assessment shall not be made under section 145(3) read with section 144.*

*iii) In case of capital introduction by partners, you are required to produce all evidences in support of your claim and justify the genuineness of transaction with material evidences on record.*

*iv) In case of opening and closing stock, you are required to provide all the details of valuation of the stocks. The quantitative and qualitative analysis for valuation needs to be placed on record."*

7. In response to notice under section 142(1) and questionnaire, the assessee submitted the details. Subsequently, the AO vide letter dated



12.12.2008 required the assessee as to why the books of accounts should not be rejected under section 145(3) of the Act and GP should not be adopted on estimate basis. The AO rejected the books of accounts under section 145(3) of the Act and applied the gross profit rate at 10.80% by observing as under: -

*“1. Under valuation of closing stock, low margin declared and low yield of finished goods.*

*In connection with the above, assessee’s submission dated 20.06.2008 is on the same line as was offered during the course of set aside proceedings under section 263 of the Income Tax Act 1961.*

*As the assessee has failed to justify low margin profit shown, justify the low yield of the finished goods as compared to market trends and has not explained the reasons for under valuation of closing stock with supporting evidences and with books of account and bills, the assessee’s books of account do not indicate correct account of the assessee and provision of section 145(3) are invoked and assessee’s books of accounts are rejected and gross profit of the assessee for the year are estimated on the basis of profit declared by the assessee in earlier years.*

*The assessee has shown gross profit ratio in the current Assessment Year @ 6.57% and GP ratio for the previous year has been shown at 10.80%. Assessee is carrying on the same business with more or less the same clients. GP for the current*





*year is estimated as per the previous year GP ratio at 10.80% which results in addition of ₹ 1,14,00,817/- (Gross Profit for current A.Y. @6.57% ₹ 1,76,87,418 ; Gross Profit for the Current A.Y. @ 10.80% ₹ 2,90,88,235)/*

*II As regards, addition to capital account by the partners, assessee has file copies of loan confirmation letters, personal passbook, capital account in the firm, and bank statement of the firm. As the assessee has explained the sources for introduction of capital by the partners and has proved the genuineness of the same, the explanation submitted by the assessee is accepted and no addition is made on this issue."*

Aggrieved against the action of the AO rejecting the books of account under section 145(3) of the Act and applying gross profit rate at the rate of 10.80% as against the declaring profit rate of the assessee at 6.57% preferred appeal before CIT(A). The CIT(A) find no fault with assessee's non-maintenance of stock quantity-wise detailed of closing stock and valuation of closing stock tally and accepted the contention of the assessee vide Para 3.6.2 to 3.6.6 as under: -

*"3.6.2 I have carefully considered the facts of the case, reasoning of the Assessing Officer and the submissions of the Id Authorised Representative of the appellant. I find that the action of the Assessing Officer in rejecting the book results have to be upheld for the reasons given by me against the discussion of various issues in the earlier paragraphs. Quality-wise stock details even though*



*not possible to maintain, basic records such as labour register and notings at manufacturing stage have not been produced before the Assessing Officer which could have largely substantiated the stock, yield and valuation of sales. General reply has been given by the appellant for low yield ratio vis-a-vis the market bench mark which is about 33%. Reasons for fall in GP in relation to FY.2000-01 are not adequately enough to explain fall below the rate of GP of the earlier year.*

*3.6.3 However, the appellant has to a large extent explained the defects and deficiencies pointed out by the Assessing Officer*

*3.6.4 Firstly, the non-maintenance of quality-wise details of closing stock is rightly a trade hazard and cannot be avoided. In diamond manufacturing there is a continuous process of assorting and grading. The manufactured goods are sold according to the orders of the customers. The lots are mixed, sent for manufacturing and re-assorted. Hence, non-maintenance of quality-wise stock for individual pieces cannot be entirely held against the appellant.*

*3.6.5 Secondly, the valuation of closing stock if not wholly, has been substantially explained by the appellant. The appellant has rightly pointed out that average per carat price of closing stock is Rs 9421/- and it cannot be specifically applied to any particular instance of sale. There would be a range of goods in the closing stock out of which high quality goods could be sold for Rs.74,852/- to Rs 23,611/-. The*



*explanation of the appellant is partially correct and acceptable.*

*3.6.6 Thirdly, the appellant has also rightly explained that the fall in Gross Profit is not overnight. The gross profit of the earlier year was © 7%. Only the GP of year before stood at 10.8%. The GP of the earlier year has been accepted by the Department."*

8. Finally, the CIT(A) after considering the entire facts noted that taking into account the defects pointed out by the AO that it would be reasonable to take an average GP of the preceding last year and disclosed GP rate of current year. Accordingly, he worked out the average of the two and applied GP rate of 8.68% and partly sustained the addition by observing in Para 3.6.7 as under: -

*"3.6.7 Considering the entire facts it has to be concluded that the appellant has explained to a considerable extent the reasons for non-maintenance of closing stock and low yield. In the light of various explanations given addition of Rs. 1,14,00,817/- made by the Assessing Officer to a returned income of Rs.32,18,850/- cannot be sustained in entirety. In fact, in the earlier 143(3) order there has been already addition to the returned income. It is a fact that GP of the earlier year was 7% and no adverse inference has been drawn by the Assessing Officer regarding the GP rate. So it cannot be said that there was an overnight fall of GP There is a growth in sale from Rs.20,98,28,519/- in AY.2002-03 to Rs.26,93,35,516/- in the AY.2003-04 which is the year under consideration. The GP in*



*absolute terms also increased from Rs.1,50,62,638/- in AY.2002-03 to Rs 1,76,87,418/- in AY.2003-04 which is the year under consideration. Therefore, the submissions of the appellant are reasonable and cannot be summarily rejected. However, taking into account all the defects pointed out by the Assessing Officer it would be reasonable enough to take average GP ratio of the year preceding last year and the disclosed GP rate of the current year. The GP rate of FY.2000-01 which is the year preceding last year was 10.8%, the GP rate of the current year is 6.57%. The average of the two works out to 8.68%. This can be applied to the sales and there would be a gross profit of Rs.2,33,78,322/- according to this rate. At this rate there will be an addition of ₹ 56,90,904/- to the gross profit and addition of upto this extent is confirmed. The balance addition made by the Assessing Officer is deleted. In the result this ground of appeal is partly allowed."*

Aggrieved, both the assessee as well as Revenue came in appeal before us.

9. Before us, the learned Counsel for the assessee argued that the issue of valuation of stock as alleged by the AO is without any basis and he explained that the assessee has sold goods costing to ₹ 37,703/- to ₹ 74,852/- in the first month of the next financial year i.e. from 01.04.2003. He explained that such instances are few but the high quality goods are also sold in next financial year not out of manufacturing account but out of local purchase. He explained that these were around 70.36 carats of high value of cut and polished diamonds purchased during the year 2002-03 and only part of them were sold during the year. The learned Counsel



for the assessee drew our attention to the purchase bills, which are filed in assessee's paper book at pages 1 to 10 and the statement showing sales of the cut and polished diamonds in the next financial year i.e. 2003.04 at page 11. Also copies of export invoices, shipping bills, airway bills showing sales of the cut and polished diamonds in the next FY 2003-04, which are enclosed at pages 12-49.

10. In view of these facts, we are of the view that the sale of high value stock in the first month of the next financial year is successfully explained by the assessee and the average price per carats of closing stock of diamond is ₹ 9421/- and we are of the view that the same cannot be specifically applied to any particular instances of sale. Accordingly, we are of the view that the assessee is able to explain the issue of valuation of closing stock.

11. The next aspect regarding under valuation of closing stock, we are of the view that the same will apply to under valuation of opening stock in the next AY i.e. AY 2004-05 and it will not impact the profits of the next year because according to the learned Counsel in the next year the effective rate of taxation was higher due to progressive reduction in the claim of deduction under section 80HHC of the Act. In view of this fact, we are of the view that in case under valuation is to be assessed in any eventuality the effect of the same will be given in the next year and in the next year rate of taxation is higher. As regards to the issue of low yield of goods produced by the assessee as compared to the market rates, the learned Counsel for the assessee stated that the AO as well as CIT(A) while passing the revision order has relied on no evidence or there is no evidence on record which shows that import diamonds are of low quality and are capable of low yield. The learned Counsel submitted that manufacturing yield differs from manufacturer to manufacturer and the



quality of the goods. He also stated that even the yield of diamond differs from lot to lot depending upon the procurement of rough diamonds. It was also claimed that labour Register was produced before the AO and as per manufacturing details the yield as on 26.12.2002 was 40.96% from the imported rough diamond valued at ₹ 15,927/-. The yield as on 24.05.2002 was 16.46% from the rough diamond, which was valued at ₹ 774 per carats. As per the accounts the average yield for whole of the year varies from 40.96% to 60.96% depending upon the quality of the rough diamond processed for manufacturing.

12. Despite the CIT(A) accepted the issue of high valuation of closing stock and under valuation of closing stock and also low yield during the year, the CIT(A) restricted the gross profit rate without giving any reasoning. The learned Sr. Departmental Representative, however relied on the assessment order and also revision order passed by the CIT.

13. We have gone through the assessment order and the order of CIT(A). We have seen that the AO has nowhere pointed out any specific defect in the books of accounts and rejected the undervaluation of opening and closing stock, that also without any successful attempt as is evident from the above discussions. The only debatable issue remains that the gross profit declared in previous assessment year i.e. AY 2002-03 was at ₹ 10.80% as against the GP rate of current assessment year 6.57%. Whether the gross profit declared at lower percentage can be the reason for rejection of books of accounts. In our view, once there is no defect in the books of accounts, the books of accounts cannot be rejected summarily. In our view, in the absence of a definite finding that the case falls within the first proviso to section 145(1) of the Act, the provisions of section 145(2) cannot be made applicable to sustain rejection of books results and addition to the gross profit. The mere fact that the gross profit



**ITA Nos. 5899, 5979 & 273/Mum/2009**

is low is not a circumstance or material which could justify estimate of GP. In the given case, the assessee is able to substantiate the defects pointed out by the AO regarding undervaluation of closing stock and opening stock and low yield. Once, this is a fact that there are reasons, as explained above, the low gross profit yield is due to certain reasons, the AO cannot reject the books of accounts. Accordingly, we are of the view that the CIT(A) has erred in sustaining the rejection of books of accounts. We allow the appeal of the assessee and the appeal of Revenue is dismissed.

**14. In the result, the appeal of Revenue in ITA No. 5899/Mum/2009 & appeal of assessee in ITA No. 273/Mum/2009 are dismissed and the appeal of assessee in ITA No. 5979/Mum/2009 is allowed.**

Order pronounced in the open court on 28-09-2018.

Sd/-

(राजेश कुमार / RAJESH KUMAR)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 28-09-2018

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, Sr.PS*

**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)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai