

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

ITA No. 666/Kol/2018
Assessment Year: 2010-11

ITA No. 667/Kol/2018
Assessment Year: 2011-12

ITA No. 668/Kol/2018
Assessment Year: 2012-13

ITA No. 669/Kol/2018
Assessment Year: 2013-14

Surana Diamond Jewellery Pvt. Ltd.....Appellant
S.L. Kochar, Advocate
5, Ashutosh Chowdhury Avenue
Kolkata - 700 019
[PAN : AALCS 4683 B]

Principal Commissioner of Income Tax, Circle-3, Kolkata.....Respondent

Appearances by:

Shri S.L. Kochar, A/R & Shri Anil Kochar, A/R, appeared on behalf of the assessee.
Shri Sanjay Rai, Addl. CIT Sr. D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : November 13th, 2018

Date of pronouncing the order : November 28th, 2018

ORDER

Per J. Sudhakar Reddy, AM :-

All these four appeals are filed by the assessee directed against identical orders of the Learned Principal Commissioner of Income Tax -3, Kolkata, (hereinafter the Id. Pr. CIT), passed u/s. 263 of the Income Tax Act, 1961 (the 'Act'), for the Assessment Years 2010-11, 2011-12, 2012-13 & 2013-14.

2. The Id. Pr. CIT, vide this revisionary order passed u/s 263 of the Act, set aside the assessment order passed by the Assessing Officer u/s 147 r.w.s. 143(3) of the Act, and directed the Assessing Officer to initiate fresh assessment proceedings and carry out necessary verification and take action accordingly. Aggrieved, the assessee is in appeal before us.

As the facts and issues arising in all these four appeals are identical, for the sake of convenience they are heard together and disposed off by way of this common order.

3. The Id. Counsel for the assessee submitted that the re-assessment was initiated consequent to a receipt of information from DGIT(Inv.) Kolkata, that the assessee had taken accommodation entry from an entry operator of Mumbai, who had provided bogus entries for purchases.

He submitted that the Assessing Officer questioned the assessee during the course of re-assessment proceedings and that the assessee has submitted each and every detail including details of purchases, invoice numbers, payments made through banking channels, stock registers giving quantitative details, corresponding sales/corresponding stock details etc. He submitted that the Assessing Officer issued notice u/s 133(6) to the sellers and all these notices were responded to by the sellers, who confirmed the transactions. He submitted that the only doubt that the Assessing Officer had was the manner in which the diamonds were transported from Surat to kolkata and in reply to this doubt, the assessee had furnished flight details along with copies of boarding passes to demonstrate that the Director of the assessee company had travelled and carried these diamonds to Kolkata. He submitted that after verification of such detailed documents/evidence filed by the assessee, the Assessing Officer disallowed 3% of the purchases. He submitted that the assessee had not accepted this decision of the Assessing Officer and has carried the matter in appeal. He filed documents to show that the matters are pending before the Id. CIT(A)-3, Kolkata. He submitted that when the matter is before the Id. CIT(A), the Id. Pr. CIT, does not have jurisdiction u/s 263 of the Act. He relied on the judgment of the Hon'ble Gujarat High Court in the case of *Pr. Commissioner of Income Tax vs. Tejua Rohitkumar Kapadia in Tax Appeal No. 691 of 2017*, wherein the Hon'ble High Court has upheld the order of the Tribunal on similar facts and circumstances, that the purchases cannot be considered as bogus purchases as there was no evidence to show that the amount was recycled back to the assessee. The Hon'ble Supreme Court in SLP (Civil) Diary No(s). 12670/2018, dt. 04/05/2018, dismissed the SLP filed by the revenue on this judgment. He relied on certain decisions for the proposition that the exercise of revisionary powers u/s 263 of the Act, under the fact and circumstances of the case, is bad in law.

3.1. The Id. D/R, Shri Sanjay Raj, on the other hand opposed the contentions of the assessee that the Assessing Officer has in a pre-determined manner, completed the assessment by adding only 3% of the total bogus purchase and thereby ignoring 97% of the bogus purchase which is an error causing prejudice to the revenue. He submitted that the information was received from DGIT(Inv.) and that the Assessing Officer has not properly verified the same. He referred to the paper book filed by the assessee and submitted that a look at the copy of the bills of purchases reflects that this is a bogus purchase. Similarly, he referred to the copy of ledger account and submitted that the head of account as "Diamonds @ 13000" is dubious and it is common knowledge that diamonds are valued, based on the cut, size etc. He submitted that no such details are available in the bill which casts doubt on the genuineness of the bill. The Id. CIT D/R, further submitted that, he made enquiries with the VAT Department of Gujarat and the addresses of the seller appears to be different. No evidence in this regard was filed before the Bench. He relied on the order of the Id. Pr. CIT and argued that as no proper verification has been conducted by the Assessing Officer, there is an error in the order of the Assessing Officer which has caused prejudice to the revenue. Regarding the judgment of the Hon'ble Gujarat High Court in the case of *Tejua Rohitkumar Kapadia (supra)*, he submitted that, in that case, the sellers had confirmed the transactions and hence it is distinguishable on facts.

3.2.1. In reply, the Id. Counsel for the assessee, Shri Anil Kochar, submitted that this is not assessment proceedings and it is not for the Id. CIT D/R to look at the copies of the documents in the paper book and express doubts on the genuineness of the same without verification. He wanted the Id. D/R to file an affidavit making the above allegations that the documents in the paper book are not genuine and submitted that suitable reply would be given. He filed strong objections and argued that the copies of boarding passes, copies of tickets etc. are genuine documents and that no authority had doubted the same till date. On the ledger account and the head of account of ledger, he submitted that the traditionally the diamonds are classified value wise by this manufacturers and ledgers are maintained rate wise. He submitted that there is no change in the method of maintaining accounts over the years and that the books of

accounts of the assessee were never rejected and have always been accepted by the revenue. He pointed out that in this case all the sellers had confirmed the transactions directly to the Assessing Officer.

4. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

5. In response to the showcause notice issued by the Id. Pr. CIT to the assessee u/s 263 of the Act, the assessee filed detailed reply. The reply is extracted at page 2 to 4 of the order passed by the Id. Pr. CIT u/s 263 of the Act. This is extracted for ready reference:-

“The assessee company is in the business of manufacturing and sale of jewellery & ornaments. Purchases of diamonds and precious stones are mostly from outstation parties at Mumbai and Surat. All the payments are made through banking channels. As is required under the provisions of Companies Act as well as under Income Tax Act the assessee is maintaining complete set of books of accounts supported by Bills, vouchers, Bank statements etc.

The assessee has obtained Tax Audit Report also under the provision of Sec.44AB of the Act. Further, as is required, being additional information pursuant to Part-II of Schedule-VI of the Companies Act, 1956, the quantitative details in respect of goods dealt in by the assessee with regard to consumption of raw material, opening stock, purchases and closing stock which are diamond, gold and others were mentioned by the Auditor in the financial audited statement of accounts. Your Honour will kindly appreciate the fact that whatsoever purchases have been made from the parties in respect of whom the purchases are being disbelieved, finds place in the stock register and subsequently in the information provided by the Auditor as above. In the case of the assessee, the stock tally quantitative wise have been fully maintained and for every purchase there is either corresponding sale or if not sold during the year then the same appears as closing stock at the end of the year.

The assessee has business of purchase and sale of diamonds and has manufacturing activities whereby jewellery is made out and sold. Kindly refer to the audited statement of accounts which would show the extent of the total purchases which have been made by the assessee and relevant sales and manufacturing of jewellery for sale.

Your observation is that the A.O. could not verify the genuineness of the delivery of the alleged purchase material since it was not clarified from assessee side and from the seller as well. In this connection, it is submitted that as already stated

earlier, the assessee purchases diamonds from parties situated at Mumbai and Surat and for this purpose the Directors travels to these places and after examining the diamonds take the delivery personally. This, the A.O., has specifically enquired from the assessee and the assessee, in turn, has submitted detailed explanation with regard to the same by submitting a letter dated 25.01.2016 during the course of hearing for the purpose of assessment. For the sake of convenience the extract of the same is being reproduced hereunder: -

This refers to the ongoing proceedings U/S 148 of the Income Tax Act, 1961.

As required by you the assessee is submitting a detailed record of purchases from M/s Nayan Gems & M/s NazarImpex Pvt. Ltd. The statement specifies:

*Name of Party
RC No.
Invoice No.
Invoice Date
Date of deposit at Shop
Invoice Value
Goods Carried by
Travel Details (including Flight No. & Date)*

To conclude, it is to bring to your Honour's kind notice that all the purchases and sales are duly supported by documentary evidences. For each and every purchase there is supporting Bill and payments are made by cheques passing through the banking channel. Sales are supported by Bills/cash memos and these are duly finding place in the accounts by way of entries recorded therein.

Proceedings for assessment were drawn by the A.O. u/s 142(1) and u/s 143(2) and as requisitioned by the A.O. all relevant details were submitted The assessee had with reference to the audited accounts explained to the A.o. about the maintenance of stock register with quantitative analysis. Details about the purchases which were having doubts in the mind of the A.O. with reference to which proceedings were initiated by the A.O. were submitted and it was-explained to the A.o. with reference to chart prepared about the name of the seller, PAN, date of Bill, amount, weight of diamonds purchased, and since these purchases were made by the Director who had gone to Bombay and Surat these diamonds were taken delivery of and brought to Kolkata and as is duly reflected in the stock register were examined by the A. O. in the matter of entries being made in the stock register. Since the Director had brought these diamonds along with relevant papers, the assessee produced Boarding Pass issued, by Airlines which shows the name of the Director and Travelling particulars. Upon examination of all these details which duly established the purchase of the diamonds from existing parties who issued Bills and to whom payments are made by cheques and also examining' the delivery and the process connected therewith, the A.O. who had already issued notices u/s 133(6) to those sellers for verifications and had received communications in confirmation thereof accepted the fact of purchase of the diamonds, by the assessee and payments to the sellers by cheques.

Thus, there is no error on the part of the A.O. in the matter of framing of order of assessment u/s 143(3)/147 of the Act. Diamonds purchased by the assessee are

duly supported by documentary evidences, these have been taken delivery of and brought to Kolkata as is evidenced, entered in accounts, appearing in purchases ledger and duly disposed off and either used for manufacture of jewellery or towards sale. All these evidences have been examined by the A.O.

The assessee having not been satisfied with the proceedings u/s 148 and the resultant additions made by the A.O proceeding on the basis about the purchase price that could be estimated has made out a case for addition of amount to the total income by working out 3% of the total purchases. Against which an appeal has already submitted u/s 246A which is pending before the Ld. CIT (A) for disposal.

It is to state that the A.O., as the records would reveal has taken into consideration all relevant documentary evidences which not only 'establish the purchases which have been made by the assessee in support of which Bills have been examined by the A.O. and its delivery and ifs arrival in the city along with the Director who travelled back to Kolkata by air, on the production of boarding pass of the airlines, the issue involved in the proceedings initiated u/s 148 was duly explained to the A.O. who accepted the factual aspect about the purchase of diamonds by the assessee which stand duly confirmed by the sellers in reply to notices u/s 133(6).

It is thus submitted that order of assessment is neither erroneous nor prejudicial to the interest of revenue. All the submissions which have been made above and the evidences adduced are part and parcel of the assessment record with the A.O.

It is only a case of doubt in the mind of the A.O. with regard to the process of bringing the diamonds after obtaining delivery at Surat from the diamond dealers. That these diamond dealers have already confirmed their transactions with the assessee is duly established by independent enquiry made by the AO. u/s 133(6) of the Act. His only doubt concerns as to how the diamonds could be brought to Kolkata. This issue was very elaborately cleared & explained by the assessee by production of documentary evidences relating to travelling by Directors in support thereof air tickets/boarding Passes were submitted.

The A. O. duly verified all the details which pertained to the purchases from the aforesaid two parties' delivery thereof and evidences regarding bringing the same to Kolkata and did not find any fault though he expressed his views about the delivery of the diamonds which was duly explained by the assessee with reference to travelling details.

Under these circumstances, it is submitted that there is no error anywhere in the order of assessment made by the A.O. u/s 147/143(3). The A.O. framed order of an assessment u/s. 143(3)/ 148 which is neither erroneous nor prejudicial to the interest of revenue. Be kind enough and refer to the entire set up of the issue involved as specifically noted above which is fully apparent from records. It is requested that the proceedings u/s 263 may kindly be dropped."

5.1. The Id. Pr. CIT has not found or pointed out any factual inaccuracies in this reply. The finding of the Id. Pr. CIT is that the Assessing Officer could have made proper verification in the absence of relevant vital information. He is further of the view that the material placed by the assessee before the Assessing Officer was not sufficient to come to a conclusion that only 3% of the bogus purchases are to be considered for the additions. He concludes that there is no proper enquiry/verification conducted by the Assessing Officer.

In our view this conclusion of the Id. Pr. CIT, is factually incorrect. The quantitative details have not been found fault with. None of the facts stated, have been controverted. The reply of the assessee extracted above demonstrated that all necessary documents and evidences were furnished before the Assessing Officer. The Assessing Officer had also issued notice u/s 133(6) of the Act, to the sellers at the addresses given by the DGIT-(Inv.), Kolkata. He had received replies from these persons confirming the transactions. He only doubted the mode of delivery of these diamonds. The assessee furnished sufficient evidence to prove the mode of delivery. On these facts, the Assessing Officer chose not to bring to tax 97% of the value of the purchases to tax as bogus purchases. The issue is covered in favour of the assessee by the decision of the Hon'ble Gujarat High Court in the case *Tejua Rohitkumar Kapadia* (supra), the SLP of which was dismissed by the Hon'ble Supreme Court in *S.L.P. No. 12670/2018*. In this case also there is no proof of any money being routed back to the purchaser.

5.2. Even otherwise, when the issue is pending before the Id. CIT(A)-3, Kolkata, the Id. Pr. CIT, does not have the jurisdiction to exercise his powers u/s 263 of the Act, in view of explanation 1 (c) of Section 263 of the Act.

We also find that the Id. Pr. CIT has exercised his jurisdiction on the ground that there was no proper enquiry/verification.

5.2.1. The Hon'ble Delhi High Court in the case of *Income-tax Officer v. D.G. Housing Projects Ltd.* [2012] 343 ITR 329 (Delhi) held as follows:-

"Section 263 has been enacted to empower the Commissioner to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative

conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the revenue. The expression 'prejudicial to the interest of the revenue' is of wide import and is not confined to merely loss of tax. The term 'erroneous' means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law. [Para 10]

The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word 'erroneous' includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits. [Para 11]

In cases of wrong opinion or finding on merits, the Commissioner has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. The Commissioner cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the Commissioner must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the Commissioner and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the Commissioner can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under section 263. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the Commissioner has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question. [Para 16]

This distinction must be kept in mind by the Commissioner while exercising jurisdiction under section 263 and in the absence of the finding that the order is erroneous and prejudicial to the interest of revenue, exercise of jurisdiction under section 263 is not sustainable. In most cases of alleged 'inadequate investigation', it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without Commissioner conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. Commissioner cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed

by the Commissioner to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the Commissioner hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore, the Commissioner must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the Commissioner must come to the conclusion that the order is erroneous and is unsustainable in law. It may be noticed that the material which the Commissioner can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record. Nothing bars/prohibits the Commissioner for collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous. [Para 17]

In the instant case, the findings recorded by the Tribunal are correct as the Commissioner has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the Commissioner is that 'order passed by Assessing Officer may be erroneous'. The Commissioner had doubts about the valuation and sale consideration received but the Commissioner should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the assessee computation figures but he had reservations. The Commissioner in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and, therefore, the assessment order is 'erroneous'. The said finding will be correct, if the Commissioner had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of revenue. In latter cases, the Commissioner has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the revenue. In the second set of cases, the Commissioner cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not. [Para 19]"[emphasis ours]

Applying the propositions of law laid down in this case to the fact of our case, we hold that revisionary powers cannot be exercise under these facts and circumstances of this case. The Assessing Officer in this case considered all the evidences and had taken a possible view under the law.

The Id. D/R's oral submission that the copies of documents furnished appears to be ingenuine etc. cannot be considered as it is neither the case of the Assessing Officer nor the view of the Id. Pr. CIT that these documents are not genuine.

6. In view of the above discussion, discussing all these orders of the Id. Pr. CIT, are quashed.

7. In the result, all these appeals of the assessee are allowed.

Kolkata, the 28th day of November, 2018.

Sd/-
[Aby T. Varkey]
Judicial Member

Dated : 28.11.2018
{SC SPS}

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Copy of the order forwarded to:

**1. Surana Diamond Jewellery Pvt. Ltd
S.L. Kochar, Advocate
5, Ashutosh Chowdhury Avenue
Kolkata - 700 019**

2. Principal Commissioner of Income Tax, Circle-3, Kolkata

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches