

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT
BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.23 /Ahd/2017	निर्धारण वर्ष/A.Y.:2012-13
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Shri Santosh Singh Hukum Singh Karnawat, Prop. Shilpa Exports, 402, Parmukh Darshan Apartment, Rampara Main Road Opp. Patidar Bhawan Mahidharpura, Surat - 395 003. [PAN: ARAPK 9181 B]	Vs.	Income Tax Officer, Ward- 2(3)(8) Surat
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by	Shri Rasesh Shah, CA
राजस्व की ओर से /Revenue by	Shri P.S. Chaudhary, Sr. D.R.

सुनवाई की तारीख/ Date of hearing:	07.01.2019
उद्घोषणा की तारीख/Pronouncement on:	11.01.2019

आदेश /O R D E R

PER O. P. MEENA, ACCOUTANT MEMBER:

1. This appeal by the Assessee is directed against the order of learned Commissioner of Income tax (Appeals)-2, Surat (in short “the CIT (A)”) dated 21.09.2016 pertaining to Assessment Year 2012-13, which in turn has arisen from the order dated 26.03.2015 passed by the Income Tax Officer, Ward- 2(3)(8) Surat (in short “the AO”) under section 143 (3) of Income Tax Act,1961 (in short ‘the Act’).

2. Ground no. 1 & 2 states that Ld. CIT (A) has erred in confirming the action of the AO in making addition of Rs.1,11,61,150/- on account of bogus purchases made from M/s. Euro Diam and M/s. Little Diam.

3. Succinctly, facts as culled out from the orders of lower authorities are that the assessee is a manufacture, importer , exporter and trader of diamonds. The assessee has filed his return of income on 22.08.2012 declaring total income of Rs.3,12,660/-. It was noticed that there was a search and seizure operation carried out on 03.10.2013 in the case of Bhanwarlal Jain Group, wherein it was revealed that the said Group had provided accommodation entries to various parties in respect of bogus purchases/ sales through his benami concerns. It was noticed from the report of Investigation Wing, Mumbai that the assessee has received accommodation entries of Rs.43,83,431/- from Euro Diam and Rs.67,77,719/- Little Diam aggregating to Rs.1,11,61,150/- during the year under consideration which are alleged to be bogus concern of Shri Bhanwarlal M. Jain. Accordingly, a show-cause notice was issued on 16.03.2015 asking the assessee as to why purchases of Rs.1,11,61,150/- should not be added in his case as bogus purchases. The assessee has filed a reply vide letter dated 25.03.2015 by submitting that the assessee has made genuine purchases from the above parties which have been verified by the AO vide calling information under section 133(6). The assessee has also filed copy of ledger account, copy of bank statement and copy of purchase bills from

these parties. It was further submitted that the transaction was routed through banking channel. The assessee has made total purchases of Rs. 1.73 crores including purchases of Rs. 1.11 crores from above parties during the year under consideration as against which the assessee has made sales of Rs.1.71 crores. However, the AO has observed that Shri Bhanwarlal M. Jain in his statement recorded under section 132(4) on 11.10.2013 has stated that he has floated various dummy concerns who are providing accommodation entries. The AO observed that investigation made by Investigation Wing, Mumbai has also revealed that actual importers of diamonds imports part of their diamond requirements through benami entities operated by the Shri Bhanwarlal M. Jain and family. In view of this, the AO treated the purchases of Rs.1,11,61,150/- made from above two parties as bogus and made addition of said amount to the total income of the assessee.

4. Being aggrieved, the assessee filed an appeal before the Id. CIT (A). During the course of appellate proceedings, the assessee was directed to provide current address of the sellers for verification and production of the parties. In response to which, the appellant vide his submissions dtd. 24.08.2016 submitted that it is not possible to provide the current address of sellers for verification nor possible to produce these parties. However, it was contended that since these two parties had replied to notice issued to them under section 133(6) of the Act and the payments have been made by account payee cheques which proves

the genuineness of the transactions. The CIT (A) observed that the main thrust of the assessee is on that the payments has been made through banking channel by account payee cheques and parties have filed confirmation along with their return of income. The appellant has also contended that Shri Bhanwarlal M. Jain had retracted his statement on oath given before Investigation Wing. However, CIT (A) observed that the perusal of details and search action was conducted in the case of Shri Bhanwarlal M. Jain wherein various evidences were found which led to admission under section 132(4) by Shri Bhanwarlal M. Jain that he was in the business of accommodation entries. In view of these facts and circumstances, after relying on some of case laws, the CIT (A) upheld the action of the AO in treating the purchases as bogus.

5. Being, aggrieved the assessee filed this appeal before the Tribunal. The ld. Counsel submitted that during the course of assessment proceedings the assessee has submitted details of purchases along with copy of purchase bills, details of opening and closing stock, copy of bank statement, details of sundry debtors and creditors. During the course of appellate proceedings, the assessee has submitted copy of ledger account, copy of bank statement, acknowledgement of return of income filed. It was further submitted that both the parties have been registered with VAT Department. The purchases have been duly incorporated in stock register and purchases of Rs.67,77,719/- made from M/s. Little Diam were exported to M/s. Lukhi Diam , B.V.B.A of

Belgium for which expert document were filed. The goods purchased from M/s. Euro Diam were sold locally. In case of bogus purchases, normally sellers withdraws cash immediately after issue of cheques, whereas this is not the case of seller as could be seen from bank statement. Therefore, modus operandi adopted in bogus purchases is not proved by the AO. Therefore, the AO was not justified in making disallowance by treating these as bogus purchases. It was further submitted that Shri Bhanwarlal M. Jain is neither proprietor nor signatory in both the concerns from whom the assessee has effected purchases. Therefore, there is no legal validity of statement given by Shri Bhanwarlal M. Jain, which is being a third party. It was further submitted that Shri Bhanwarlal M. Jain has filed a retraction statement before the CBDT, therefore, said retracted statement cannot be used against the assessee. Further, the copy of statement of Shri Bhanwarlal M. Jain was not made available to the assessee. Therefore, no addition can be made merely on the basis of the allegation that the above third party has admitted that bills provided was merely accommodation bills as held by Hon'ble Gujarat High Court in the case of ACIT vs Akruti Dyeing and printing Mills Pvt. Ltd (Tax Appeal No.997/2008 dated 27.01.2009) and Kishanchand Chellaram v. CIT [1980] 125 ITR 713 (SC) [1980] 4 Taxman 29 (SC). The Id. Counsel further contended that no cross-examination of the parties of whom statement has been used against the assessee has been allowed by the AO. Therefore, there is a violation of principle of natural justice, hence, the credence of the

statement of Shri Bhanwarlal M. Jain amounts to serious flaw and makes assessment impugned order nullity as held by the Hon'ble Supreme Court in the case of Andaman Timber Industries vs. Commissioner of Central Excise (2015) 281 CTR 241(SC). During the course of assessment proceedings, the AO has called for information under section 133(6) from the above two parties who have duly complied with, hence, said parties cannot be said as bogus concerns. The learned counsel for the assessee relying on the decision of Hon`ble Gujarat High Court in the case of CIT v. M K Brothers [1987] 30 Taxman 547 (Guj) / [1987] 163 ITR 249 (Guj) submitted that it was held that there was no evidence anywhere that those concerns give bogus vouchers to the assessee and further there was nothing to indicate that any part of fund given by the assessee to those parties came back to the assessee in any form. In such circumstances, it was held that the evidence was not adequate to conclude that purchases were bogus and therefore, the addition deleted by the Tribunal was upheld. In the case of the assessee also, there is no evidence to show that the assessee has given any fund to seller, which has come back to the assessee in any form.

6. The Id. Counsel further placed reliance on the decision of Co-ordinate Bench of Surat Tribunal in the case of Sudeep M Shah v. ITO [I.T.A.No. 2423/Ahd/2016 dtd. 29.05.2018] and M/s. Deluxe Diamonds Pvt. Ltd. v. ITO [I.T.A.No. 1396/Ahd/2017 dtd. 11.04.2018] wherein relying on the judgement of Hon'ble Gujarat High Court in the case of Mayank Diamonds Pvt. Ltd. vs. ITO (Tax Appeal No. 200/2003 dated

07.11.2014) the addition made by the AO on account of bogus purchases was restricted to 5 % of bogus purchases considering the average of diamond industry. However, these decisions of Tribunal is distinguishable in the case of the assessee as in these cases notice under section 133(6) issued was returned back un-served whereas in the case of the notice under section 133(6) were duly served and replied as could be seen from the assessment order. Therefore, it was urged upon us that total addition made may be deleted.

7. *Per contra*, the ld. Sr. D.R. submitted that no such parties was found on given address as could be seen from report of Investigation Wing Mumbai. Further, the assessee has failed to provide current address of these parties and produce the same before CIT (A) when he specifically asked as discussed in para 6.1.2 in his order. Which means that these parties are bogus. Hence, lower authorities are justified in their action.

8. We have heard the rival submissions and perused the relevant material on record. We find that the assessee has made purchases of Rs.43,83,431 from M/s. Euro Diam and Rs. 67,77,719 from M/s. Little Diam. The assessee has failed to produce the said party for verification to prove the genuineness of purchases. Shri Bhanwarlal M. Jain in his statement recorded under section 132(4) of the Act during the course of search and seizure operation conducted in their case have admitted that they used to provide bogus accommodation bills. However, the

copies of his statement was not made available to the assessee during the course of assessment proceedings nor any cross-examination was allowed. Therefore, the violation of not allowing cross examination to the assessee as held in the case of Andaman Timber Industries v. Commissioner of Central Excise Kolkata-II [2015] 13 STD 805 (SC) (Civil Appeal No. 4228 of 2006) dated September, 2, 2015. (SC) which supports the case of the assessee. The assessee has duly produced the copies of bills, ledger account and bank statement and acknowledgement of return and payments is made by account payee cheques. It is obvious that there cannot be any sales without purchases. The book results of the assessee are in line with book results of earlier years. The books of accounts are audited under section 44AB of the Act and no adverse comments pointed out by the auditors. Quantity records are maintained. The sales of Rs. 67,77,719 made from M/s. Little Diam have been exported to M/s. Lukhi Diam, B.V.B.A. of Belgium of which copy of expert document was also filed. There is no evidence that cash received back except statement of Shri Bhanwarlal M. Jain, which is general in nature and same was also not made available to the assessee. This shows that purchases have been made, but may be not from the party from whom purchases bills have been obtained. The only possibility is therefore, is that the assessee might have inflated the purchases, as sale has not been doubted by the AO. In view of this matter, it is not just or reasonable to treat entire purchases when corresponding sales has not been doubted by the AO. There cannot be

any sales without making purchases. We are, therefore, of the view that it is a simple logic that when the AO has not questioned the sales /stock then there is no logic to disallow the 100% bogus purchases. It is obvious that there cannot be any sales without purchases. The Co-ordinate Bench of the Tribunals in the case of Sudeep M Shah (supra) and M/s. Deluxe Diamonds Pvt. Ltd. (supra) in their decisions have restricted the disallowance to 5% of total bogus purchases.

9. We further notice that the Hon`ble Jurisdictional High Court in the case of Mayank Diamonds Pvt. Ltd. v. ITO [Tax Appeal No. 200 of 2003] dated 17.11.2014 wherein the Hon`ble High Court has observed as under: *“5. We have heard learned advocates for both sides and perused the orders passed by the CIT as well as the Tribunal. As a result of hearing and perusal of records, it is borne out of that the average profit which has been considered for this industry is around 3 to 7%. The Tribunal in the instant case has directed addition at the rate 12.5%, which is in our opinion, is on higher side. Learned advocate for the appellant has fairly conceded that excess 7% is on higher side and that at the most 3% may be applied. In that view of the matter, going by the peculiar facts of the present case, we are of the view that ends of justice will be met by taking mean of maximum and minimum of the profit rate which comes to 5%. Therefore, we think it fit to direct the Assessing Officer to apply 5% G.P. rate as the rate of 12.5% is drastically higher and 1.03% is drastically*

lower. Gross profit rate of 5% is the average rate of the industry and we think it fit to make addition on account of 5% gross profit rate. The addition be made accordingly. We therefore, answer the question raised in the negative i.e. against the revenue and in favour of the assessee.”

10. Therefore, in the light of above facts and circumstances and considering the net profit of 5% as the average rate of the industry as observed by the Hon`ble Jurisdictional High Court and following the judicial pronouncements by the Co-ordinate Bench of Tribunals and the decision of Hon`ble Jurisdictional High Court in the case of Mayank Diamonds Pvt. Ltd. v. ITO [Tax Appeal No. 200 of 2003] dated 17.11.2014; we deem it fit to restrict the addition to 5% of total bogus purchases of Rs.1,11,61,150/-. We order accordingly. The AO will worked out the addition accordingly. Thus, ground No. 1 and 2 of appeal of the assessee are partly allowed.

11. In the result, the appeal of the assessee is partly allowed.

12. The order pronounced in the open Court on 11-01-2019.

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER

Sd/-
(O.P.MEENA)
ACCOUNTANT MEMBER

Surat: Dated: 11th January, 2019/opm

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / TRUE COPY / /

Assistant Registrar, Surat