

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI
BEFORE SHRI RAJESH KUMAR, AM AND SHRI AMARJIT SINGH, JM

I.T.A. No.2552/M/2017
(Assessment Year: 2007-08)

ACIT-19(1) 2 nd Floor, Matru Mandir, Tardeo Road, Mumbai- 400007.	Vs.	M/s. Chhaya Gems 902, 9 th Floor, Prasad Chambers, Opera House, Mumbai-400004.
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. : AAAFC2322D		
(Appellant)	..	(Respondent)
Assessee by:		Shri K.A. Vaidyalingan (AR)
Department by:		Shri Abi Rama Kartikiyen (DR)

Date of Hearing: 06.03.2019
Date of Pronouncement: 27.03.2019

ORDER

PER AMARJIT SINGH, JM:

The present appeal has been filed by the revenue against the order dated 31.01.2017 passed by the Commissioner of Income Tax (Appeals)-30, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the assessment year 207-08.

2. The revenue has raised the following grounds: -

- "1. "Whether on the facts and in the circumstances of the case and in law, the La. CIT(A) justified in restricting the disallowance of purchases @ 2% made by the AO on account of bogus purchases of rough diamonds of Rs 4,34,15,667/- made by the assessee from bogus parties viz M/s Moulimani impex Pvt. Ltd, when during the search and seizure operation it was conclusively proved

- beyond doubt that these parties are only into providing accommodation entries and do not do any real business.*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) justified in not appreciating the fact during the search and seizure operation, directors of such parties have accepted on oath that they are providing only accommodation entries and not doing any real business, the treatment of such loan as being genuine does not hold ground?*
 5. *"The appellant prays that the order of the CIT(Appeals) of the above grounds be set aside and that of the AO be restored."*
 6. *The appellant craves leave to amend or alter any ground or to submit additional new ground, which may be necessary."*

3. The brief facts of the case are that the assessee filed its return of income for the A.Y. 2007-08 on 27.10.2007 declaring income to the tune of Rs.3,71,53,457/-. The assessment of the assessee was completed u/s 143(3) of the I.T. Act on 10.11.2010 at an income of Rs.3,71,53,460/-. Thereafter, the case was reopened u/s 147 of the Act after recording following reasons:-

"A search & seizure action was conducted on Rajendra Jain Group/Sanjay Choudhary Group/Dharmichand Jain Group on 3.10.2013 by the DGIT (Inv.), Mumbai. During the course of search proceedings, it was established that the group concerns are all paper companies / firms / proprietorship concern with no real business activities, operating solely with the purpose of facilitation of fraudulent financial transactions which includes, among others, providing of accommodation entries in the form of unsecured loans to interest parties, issuing of bogus sale bills to various parties and providing a bogus front to concerns which do not want to import diamonds in their own hands / books of accounts.

On going through the documents forwarded by the DGIT (Inv.) Mumbai, it was found that the above mentioned assessee has obtained accommodation entries of bogus purchases from various concerns of

Rajendra Jain Group/Sanjay Choudhary Group/Dharmichand Jain Group, during the financial year, 2006-07 relevant to AY 2007-08, the details of which is given as under :-

<i>Sr. No.</i>	<i>Name of the hawala parties</i>	<i>Bill amount</i>
<i>1</i>	<i>Moulimani Impex Pvt. Ltd.</i>	<i>43415667</i>
	<i>Total</i>	<i>43415667</i>

After the reply of the assessee, the bogus purchase in sum of Rs.4,34,15,667/- was added to the income of the assessee. The total income of the assessee was assessed to the tune of Rs.8,05,69,124/-. Thereafter, the assessee filed an appeal before the CIT(A) who restricted the addition to the extent of 2% of the bogus purchase. Feeling aggrieved, the revenue has filed the present appeal before us.

ISSUE NO.1& 2

4. Issue nos. 1 to 2 are inter-connected, therefore, are being taken up together for adjudication. Under these issues the revenue is challenging the restriction of the addition to the extent of 2% of total bogus purchase in sum of Rs.4,34,15,667/- from M/s.Moulimani Impex Pvt. Ltd. The AO raised the full addition in connection with the alleged bogus purchase i.e. to the tune of Rs.4,34,15,667/-. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.: -

“7.3 1 have carefully considered the rival contentions on the issue. On perusal of the rival contentions and the material on record, I have found that in the appellant's case, Ld. AO has not made independent verifications nor he has attempted to issue notice u/s. 133(6)/ 131 of the I.T. Act, but the fact remains that there was an overwhelming evidence

in the form of sworn statements recorded from the alleged suppliers given before the Investigation Wing, Mumbai that they are only name sake proprietors/ partners / directors of the concerns and the actual management & control is by Shri Rajendra Jain/ Sanjay Choudary/ Dharmichand Jain Group, and their family members. They have also admitted that they are only giving accommodation entries to several parties and the appellant is one among them.

7.4 After weighing the evidence pro and con, I am of the opinion that onus is always on the appellant to prove as to how the material purchased was firstly obtained when the suppliers themselves admitted that they never did the business and are merely name lenders for the business concerns of Shri Rajendra Jain/ Sanjay Choudary/ Dharmichand Jain Group, who have admitted that only accommodation entries were given and no actual sale to those parties. In view of the same, I am in agreement with the findings of the AO that the purchases are not made from these parties but from the grey market by paying cash and as the bills are not available for such transactions, obtain bills from third parties. From these findings, it can thus be safely assumed that the appellant has grossly failed in its duty to mitigate the burden cast upon it in so far as proving the genuineness of the transaction from the said parties are concerned.

7.5 Though the appellant argues in the written submissions that by giving full details they have discharged their onus, it is pertinent to mention that while dealing with the concept of burden of proof, onus of proving is always on the person who makes the claim. While dealing with the issue of deciding the burden of proof, Hon'ble Supreme Court in the cases of CIT Vs. Durgaprasad More 82 ITR 540 and Sumati Dayal Vs. CIT 214 ITR 801 has held that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not real and that Taxing Authorities are entitled to look into surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. The Hon'ble court also held that, it is no doubt, true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden to prove that it is not taxable because it falls within exemption provided by the Act, lies upon the assessee. In the case of Durgaprasad More (Supra), the Hon'ble Court went on to add that a party who relies on a recital in a Deed has to establish the truth of this recital, otherwise it will be very easy to make self serving statements in documents either executed or taken by a party who relied on those recitals. If all that an

assessee who wants to evade tax has to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. The Hon'ble Court further held that the Taxing Authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look in to the surrounding circumstances to find out the reality of the recital made in those documents.

7.6 Reliance is also placed on the judgement of Hon'ble Supreme Court in the case of Sri Meenakshi Mills Ltd 63 ITR 609 where it was held that the I.T. Authorities are entitled to pierce the veil of Corporate Entity and to look into reality of transaction. In the case of McDowell & Co. 154 ITR 148(SC) it was stated that implications of tax avoidance are manifold. First, there is substantial loss of much needed public revenue. Next, there is serious disturbance caused to the economy of the country due to piling of mountains of black money, causing inflation. Thus, there is "the large hidden loss" to the community, by some of the members in the country being involved in the perpetual war waged between the tax payer and his expert team of advisors, and accountants on the one side and the tax gatherer and his perhaps not so successful advisors on the other side.

7.7 The onus to prove that apparent, is not the real one, is on the party who claims it to be so, as held by the Hon'ble Supreme Court in the case of CIT V. Daulat Ram Rawatmull [1973] 87 ITR 349 and CIT v. Durga Prasad More (supra). It is also a settled legal proposition that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In the instant case, the appellant has miserably failed to lead the evidence. The Hon'ble Supreme Court, in the case of Chuharmal v. CIT [1988] 172 ITR 250 / 38 Taxman 190 highlighted the fact that the principle of evidence law are not to be ignored by the authorities, but at the same time, human probability has to be the guiding principle, since the AO is not fettered, by technical rules of evidence, as held by the Hon'ble Supreme Court in the case of Dhakeswari Cotton Mills Ltd. v. CIT [1954] 26 ITR 775. The Hon'ble Supreme Court, in the case of Chuharmal (supra) held that what was meant by saying that Evidence Act did not apply to the proceedings under Income-tax Act, 1961, was that the rigours of Rules of evidence, contained in the Evidence Act was not applicable; but that did not mean that when the taxing authorities were desirous of invoking the principles of Evidence Act, in proceedings before them, they were prevented from doing so. It was further held by the Hon'ble Apex Court that all that Section 110 of the Evidence Act, 1872 did, was to embody a salutary

principle of common law jurisprudence viz, where a person was found in possession of anything, the onus of proving that he was not its owner, was on that person. Thus, this principle could be attracted to a set of circumstances that satisfies its conditions and was applicable to taxing proceedings.

7.8 The appellant contends that the AO did not make any independent inquiries on his own. However in this case the investigation wing of the Income Tax Department conducted several inquiries in the post search investigation after the search action in the Shri Rajendra Jain/ Sanjay Choudary/ Dharmichand Jain Group cases and intimated to the assessment wing with clear cut findings that accommodation entries were provided to several parties by the group and the appellant is one among the beneficiaries from such accommodation entries. The appellant also argues that the said party is assessed with different authorities and the books of accounts are also audited. Just because the documentation part is perfect, the transaction cannot become genuine. In the present case the supplier clearly admitted that they have not done any business and given only accommodation entries and also they are only name lenders to Shri Rajendra Jain/ Sanjay Choudary/ Dharmichand Jain and there is no chance of real purchases made by them from these parties. In these circumstances, Ld. A.O. held that the transaction is not genuine but added the total amount of purchase made from MIs Moulimani Impex Pvt. Ltd of Rs. 4,34,15,667/-.

7.9 Coming to the addition made, in this case, I find that quantitative details were maintained, Ld. AO not doubted the genuineness of sales, added the total amount of purchases made from the concern of Shri Rajendra Jain/ Sanjay Choudary/ Dharmichand Jain Group. AO treated the entire amount of purchases made from MIs Moulimani Impex Pvt. Ltd and at the same time not disturbed the sales and accepted the same. Without making the purchases, it is not possible to sell the goods after manufacturing the same. In view of the same, instead of adding the entire amount of purchases, it is right to find out what is the additional benefit by resorting to such bogus purchases, which the appellant would have made from such unknown entities.

7.10 Hon'ble Gujarat High Court in the case of CIT vs. Simit Sheth (2013) 38 Taxmann.com 385 (Guj), was seized with a similar issue where the AO had found that some of the alleged suppliers of steel to the assessee had not supplied any goods but had only provided sale bills and hence, purchases from the said parties were held to be bogus. The AO in that case added the entire amount of purchases to gross profit of the

assessee. Ld. CIT(A) having found that the assessee had indeed purchased though not from named parties but other parties from grey market, partially sustained the addition as probable profit of the assessee. The Tribunal however, sustained the addition to the extent of 12.5%. Taking into account the above fact. The Hon'ble High Court held that since the purchases were not bogus, but were made from parties other than those mentioned in books of accounts, only the profit element embedded in such purchases could be added to the assessee's income and as such no question of law arose in such estimation. The tribunal for arriving the profit embedded in the transactions @ 12.5% held as under:

"Having heard the submissions of both sides, we have been informed that the malpractice of bogus purchase is mainly to save 10% sales tax etc., It has also been informed that in this about 2.5% is the profit margin. Therefore, respectfully following the of the co-ordinate bench pronounced on identical circumstances, we direct that the disallowance is required to be sustained at 12.5% of the purchase from those parties. With these directions, we hereby decide the grounds of the rival parties which are partly allowed"

7.11 The motive behind obtaining bogus bills thus, appears to be inflation of purchase price so as to suppress profits. Considering the facts of the case as well as the various case laws cited supra especially the profit element embedded in such purchases instead adding the entire amount of purchases considered as bogus. The estimation in the above case is made based on the benefit in the form of taxes and the profit margin the line of business.

7.12 In the light of the above, one has to see in the present case, which is in the line of manufacturing and trading of diamonds, what is the correct profit element embedded or the additional benefit the appellant got in resorting to such purchases from some unknown entities. In the case of diamond trade, generally the rate of VAT is stated to be levied at 1% on the purchases made from Mumbai and on the purchases made under Form 'H' no VAT is payable due to export commitment and purchases made from Surat there is no VAT chargeable. Coming to the

profit margin in the trade, the task force group for diamond industry constituted by the Government of India, Ministry of Commerce and Industry, after considering the BAP scheme, recommended presumptive tax for net profit calculated @2% of trading activity and @3% for manufacturing activity or @ 2.5% across the board. It is also ascertained that the operating profit in case of diamond trading for computation of ALP by the TP wing is consistently in the region of around 1.75% to 3%. It is also brought to my notice by the Ld. AR that the Assessing Officers are adopting 3% as the profit element embedded on the non-genuine purchases made from Rajendra Jain and other group concerns, in the subsequent assessments finalized on the similar set of facts. In view of the same and also considering the profit margin in this sector, in my considered opinion, AO adding the entire amount of purchases is not based on correct footing, considering the above facts that the profit margin in this sector i.e. around 2 to 3 percent on trade/ manufacturing and the taxes saved is around 1% and also on purchases made from places like Surat, where there is no levy of tax. In the present case, the appellant filed a letter stating that the impugned purchases are made from Surat was not liable to VAT 1% and therefore, the benefit/ saving thereof is already reflected in the financial results of the year. On verification of the invoices, it is noticed that the entire purchase made from M/s Moulimani Impex Pvt. Ltd is from Surat and VAT is not levied on the said purchases. In view of the above, in my considered opinion, if the addition is sustained to the extent of 2 % of the purchases made as the profit element embedded in such purchases from M/s Moulimani Impex Pvt. Ltd., belonging to the Rajendra Jain! Sanjay Chowdhary/ Dharmichand Jain Group concerns, the same will meet the ends of justice, since the total purchases considered as non-genuine are not suffered 1% VAT in the present case and as such there is no benefit towards VAT to the appellant. AO is directed to the estimation @2% of the purchases made from M/s Moulimani Impex Pvt. Ltd. of Rs.4,34,15,667/- Ground No.2 & 3 raised on the issue is treated as partly allowed.”

5. On appraisal of the above said finding of the CIT(A), we noticed that the matter of controversy has been adjudicated on the

basis of the decision in the case of **CIT Vs. Simit P. Sheth (2013) 38 Taxmann.com 385 (Guj)**. It is specifically held that the transaction was not effected with VAT and profit embedded to the bogus purchase was added to the income of the assessee in view of the law settled in case **Simit P. Sheth(supra)** mentioned above. The CIT(A) has also considered the profit ratio of diamond industries in which the 2% profit was assessed for trading activity and 3% for manufacturing activities and 2.5% across the board. Operating profit in diamond trading on international transaction was assessed by TPO around 1.75% to 3%. The CIT(A) has also considered the profit ratio of the assessee in the preceding year also. The facts are not distinguishable at this stage. 100% addition is a very hard decision which is not sustainable by law settled **Simit P. Sheth(supra) and other law mentioned by CIT(A)** in his order. The facts are not distinguishable at this stage. Taking into account all the facts and circumstances, we are of the that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, we decide these issues in favour of the assessee against the revenue.

6. In result, appeal filed by the revenue is hereby ordered to be dismissed.

Order pronounced in the open court on 27.03.2019.

Sd/- (RAJESH KUMAR) लेखासदस्य / ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक Dated : 27.03.2019

Sd/- (AMARJIT SINGH) न्यायिकसदस्य/JUDICIAL MEMBER

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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील)/ The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल /Guard file.

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai