

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI PAWAN SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 322/MUM/2018
Assessment Year: 2010-11
&
ITA No. 323/MUM/2018
Assessment Year: 2011-12
&
ITA No. 324/MUM/2018
Assessment Year: 2012-13
&
ITA No. 347/MUM/2018
Assessment Year: 2013-14**

M/s Sun Jewels Pvt. Ltd.
(Formerly known as M/s
Eleganza Jewellery Pvt. Ltd.)
Unit No. 102-103, SDF-IV,
SEEPZ, SEZ, Andheri (E),
Mumbai-400096.

PAN No. AABCE3519L

Appellant

Dy. CIT Circle-11(2)(2),
Vs. Room No. 421, 4th floor,
Aayakar Bhavan, M.K.
Road, Mumbai-400020.

Respondent

**ITA No. 1073/MUM/2018
Assessment Year: 2012-13
&
ITA No. 1074/MUM/2018
Assessment Year: 2013-14**

Dy. CIT Circle-11(2)(2),
Room No. 421, 4th floor,
Aayakar Bhavan, M.K. Road,
Mumbai-400020.

Appellant

M/s Sun Jewels Pvt. Ltd.
Vs. (formerly known as M/s
Eleganza Jewellery Pvt.
Ltd.) Unit No. 102-103,
SDF-IV, SEEPZ, SEZ,
Andheri (E), Mumbai-
400096.

PAN No. AABCE3519L

Respondent

Assessee by : Mr. Pramod Kumar Parida &
Mrs. Sanjukta Chowdhury, ARs
Revenue by : Mr. B.B. Rajendra Prasad, CIT- DR

Date of Hearing : 14/03/2019
Date of pronouncement: 29/03/2019

ORDER

PER N.K. PRADHAN, AM

The captioned appeals filed by the assessee and the Revenue are directed against the order of the Commissioner of Income Tax (Appeals)-18, Mumbai [in short 'CIT(A)'] and arise out of the assessment completed u/s 143(3) r.w.s. 147 of the Income Tax Act 1961, (the 'Act'). As common issues are involved, we are proceeding to dispose them off through a consolidated order for the sake of convenience. Facts being identical, we begin with the AY 2010-11.

2. The grounds of appeal filed by the assessee read as under:

1. Disallowance on account of alleged ingenuine purchases of Rs.30,458/-

- i. Whether on the facts and circumstances, the Ld. CIT(A) was right to confirm the partial disallowance as percentage of profit involved in the alleged in genuine purchases after having completely satisfied with the genuineness thereof and having accepted that there has been genuine purchases of materials; therefore, the disallowance is grossly unjustified and the same may be deleted.
- ii. Without prejudice to the above, as there is no adverse comment on the merits of purchases such as purchase invoices, statement of correlation of materials used and passing thereafter through process vis-a-vis finished goods, sales bills and ultimate realizations and payments the creditors having made by cheques, ledger

confirmations, custom gate clearances, entire purchases may be treated as genuine and the disallowance may be deleted.

- iii. Without prejudice to above, the Ld. CIT(A) failed to appreciate that where in the general statement of 3rd parties, no name of the appellant is mentioned the same loses its sanctity as the parties may have given their statement to save their case; therefore, on equity and due justice, the disallowance may be deleted.
- iv. Without further prejudice to above, judicial discipline demands that the importance be given to the jurisdictional High Court decision in preference to other High Court decisions and thus, the Ld. CIT(A) has grossly erred to neglect the same, therefore no disallowance thereof is called for.
- v. Without prejudice to the above, as the books had been accepted u/s 145, the estimate summary disallowance is uncalled for and the same may be deleted.

2. The appellant, on merits, denies its liability to penal interest.

3. Briefly stated, the facts are that the assessee is a manufacturer of gold and diamond studded jewellery for exports. It filed its return of income for the A.Y. 2010-11 on 29.09.2010 declaring total income of Rs. 13,98,570/- under the normal provisions and Rs. 8,20,054/- u/s 115JB of the Act. Subsequently, the Assessing Officer (AO) made an assessment u/s 143(3) on 25.03.2013 determining the total income at Rs. 4,18,08,634/- under normal provisions and Rs. 1,42,13,514/- u/s 115JB of the Act.

The AO received information that the assessee-company had obtained accommodation entries from the group companies/concerns which were controlled and managed by Shri Rajendra Sohanlal Jain, Shri Dharmichand Jain and Shri Sanjay Choudhary. During the impugned assessment year, the assessee had obtained accommodation

entry of Rs. 2,43,667/- from Aadi Impex (Proprietor Shri Anoop Jain) which is controlled and managed by Rajendra Jain group. On the basis of above information, the AO reopened the completed assessment by issuing notice u/s 148 dated 25.03.2015.

During the course of re-assessment proceedings, the AO asked the assessee *vide* notice u/s 142(1) dated 12.02.2016 to furnish party-wise details of purchases made during year along with their VAT /TIN No. Thereafter, in order to verify to genuineness of the concerned purchases, the AO issued notice u/s 133(6) dated 25.02.2016 to the parties, calling requisite details in support of the purchases made by the assessee. However, as recorded by the AO, no reply was received by him. In the meantime, in response to notice u/s 142(1), the assessee asked the AO to furnish the evidence and materials including any testimony, declaration or statements given by the third party against the assessee. Also the assessee contended before the AO that as it reserves the right to cross examine the alleged party, the revenue may produce the said party for cross examination. The AO has recorded that *vide* letter dated 26.02.2016, he provided copies of the statements of Shri Rajendra Sohanlal Jain. The AO also informed the assessee that as the purchases were made by him, the onus of not only establishing the genuineness of the transactions but also to produce the parties for cross examination and verification lies on it.

Also during the course of assessment proceedings, the AO issued summons u/s 131 to M/s Aadi Impex (Proprietor of Shri Anoop Jain) through Income Tax Inspector. However, as per the AO, the same could not be served due to the fact that at the address provided by the assessee, the name plate of another business agency "Kumkum

International” was stuck and the same was also found closed. On enquiry, the Inspector found that there was no entity by the name M/s Aadi Impex operating from the said address. On the basis of the above findings, the AO asked the assessee to produce the said party for cross examination. In response to it, the assessee vide letter dated 18.03.2016 filed the following reply:-

“Merely because I have failed to produce M/s Aadi Impex before you, which is rather an impossible task as no commercial dealings have been carried out with them, strong merits need to be appreciated since the correlation from purchase stage to the ultimate destination has been attempted and provided to you in a candid manner.”

However, the AO was not convinced with the above explanation of the assessee for the reason that in the statement recorded during the course of search/post search proceedings, the key person i.e. Shri Anoop Jain, controlling and managing the operations of Aadi Impex has categorically admitted that he has only provided accommodation entries without carrying out any genuine business activity. Thus the AO made an addition of Rs.2,43,667/- to the income of Rs.4,18,08,634/- determined u/s 143(3) dated 25.03.2013.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). It is seen that the Ld. CIT(A) has referred to the following statement of Shri Rajendra Jain recorded on 05.10.2015, which is a reply to question No. 14 and the same is extracted as under:

“Sir, in this regard I want to admit that, we are in the business of bills shopping through all the concerns named by me in response to question No. 13 due to which we do not have any physical stock of diamond with us at any of our place at any point of time. I would like to further add that we are

merely landing names of our various concerns to the real importers of diamonds who take the actual delivery of diamonds.”

The Ld. CIT(A), also in his order dated 05.10.2017 has observed at page 20 the following:

“Further, in his response to question 15 (on page 153 of the Paper Book), Shri Rajendra Jain has stated that the concerns mentioned in Block D (of the chart given in page 151) are the concerns actually importing the diamonds without using their name and address. They utilize the service of Shri. Rajendra Jain and his associates as name lenders. The payments to the foreign parties against the diamonds imported are also monitored by the concerns mentioned in Block D as Shri Rajendra Jain and his associates are only intermediary to the transactions. However, the actual liability for all practical purposes lies with the parties mentioned in Block D. Therefore, the parties mentioned in Block D sometimes arranges the cheque payment by getting the sales bill issued by Shri Rajendra Jain and his associates to those concerns (Block E) interested in taking bogus purchase bills for regularizing their books of accounts. Further, he clarified that he does not know the actual reason for importing the rough diamonds in the name of concerns managed and controlled by the group. From the above, one cannot deny the fact that physical i.e., actual purchase and sale of diamonds have been carried out but by using the name of the concerns instituted by Shri. Rajendra Jain and his associated and in the said process physical delivery of goods is taken by the importers.”

4.1 Thereafter, the Ld. CIT(A) relying on the decision in *CIT v. Simit P. Sheth* (2013) 38 taxmann.com 385 (Guj) held that only the profit element embedded in the said transactions could be brought to tax and thereby estimated the profit @ 12.5% on such purchases of Rs.2,43,667/-, which comes to Rs.30,458/-.

5. Before us, the Ld. counsels of the assessee submit that in the statement recorded either of Shri Rajendra S. Jain or of Shri Anoop Jain, there is no mention of the assessee receiving the accommodation entries. It is stated that the general statement should not be relied upon and in fact, in subsequent year, the balance had been cleared again by cheques and no commission payment is involved. Also it is argued that all material evidences in support of purchases and co-relation statement of purchases *vis-a-vis* finished goods from the stages of material procurement, passing through various manufacturing processes till the stage of finished goods and making exports and subsequent realisations were produced before the AO. The Ld. counsels submit that the retraction statement given by the Jain group of persons were not provided nor any opportunity to controvert the statements of allegation was given to the assessee. It is emphasize that cross-examination of the parties were not provided, hence the assessee should not suffer on account of its factual merits. Also it is stated that stock co-relation statement was presented with books of accounts maintained by the assessee which had been accepted u/s 145 of the Act. Our attention is drawn to the submission that the statutory audited books with sundry creditors' balances had been accepted by the AO. It is also clarified that the export sales made against those purchases had been accepted by the AO. It is also mentioned that the supplying parties are not related parties and sensing about the disturbed credentials of the supplying parties, the assessee had subsequently stopped dealing with those parties. It is argued that producing them before the AO was an impossible task; but

on merits everything in support was provided before the lower authorities.

Thus the Ld. counsels submit that the books of accounts of the assessee had been verified and test checked by the AO; the declared sales as export to reputed parties had been accepted without casting any doubt as to its supplies and receipts of payments later on. It is argued that it is not the case of the AO that on the alleged bogus purchases, the materials have not gone into production process as stock summary so produced with co-relation have not been adversely commented upon by the AO. It is clarified that all sales have been made to overseas parties and it is a case of recorded purchases and not otherwise and no cash element is involved.

The Ld. counsels submit that merely on the basis of statement, no addition can be made. In this regard, reliance is placed by them on the decision in *CIT v. Ramdas Motor Co.* 238 ITR 177 (AP); *CIT v. Indian Express* 143 ITR 705 (Mad), *Del. Iron Syndicate Pvt. Ltd. v. CIT* 1979 TLR 1975 (All); *New Alfa v. DCIT* (2005) 1 SOT 302 (Mum). Also relying on the decision in *CIT v. Nikunj Exim Enterprises* (2013) 35 taxmann.com 384 (Bom), it is argued that merely because the assessee has failed to produce the party, it is not logical on the part of the AO to discard or overlook the above meritorious factors in support of genuine purchases made by the assessee.

The Ld. counsels also relied on the decision in *Arceli Reality Ltd. v. ITO* (ITA No. 6492/Mum/2016 for AY 2007-08) of ITAT 'A' Bench, Mumbai; *Pravin U. Parmar Jain v. ITO* (ITA No. 6342/Mum/2014 for AY 2010-11) of ITAT 'C' Bench Mumbai; *DCIT v. Shri Shivshankar R.*

Sharma (ITA No. 5149/Mum/2014 for AY 2011-12) of ITAT 'E' Bench, Mumbai ; *ACIT v. M/s Say India Jewellers* (ITA No. 6735/Mum/2010 for AY 2006-07) of ITAT 'E' Bench, Mumbai; *Babulal C. Borana v. ITO 282 ITR 251 (Bom)*; *CIT v. M/s Nangalia Fabrics Pvt. Ltd.* (TA No. 689 of 2010) of Gujarat High Court, *Pr. CIT v. Tejua Rohitkumar Kapadia* (TA No. 691 of 2017) of Gujarat High Court and the order of the Supreme Court dismissing the SLP filed by the Revenue in *Tejua Rohitkumar Kapadia* (supra).

With the above submissions, the Ld. counsels argue that the ad-hoc disallowance confirmed by the Ld. CIT(A) be deleted.

6. On the other hand, the Ld. DR submits that as per the investigation the assessee had obtained accommodation entry of Rs.2,43,667/- from M/s Aadi Impex. Our attention is drawn to the fact that the AO could not get any reply to the notices sent by him u/s 133(6) dated 25.02.2016 meant for verifying the genuineness of the transactions. The Ld. DR further mentions that the summons issued u/s 131 of the Act to M/s Aadi Impex (Proprietor Shri Anoop Jain) through the Income Tax Inspector, could not be served because at the address provided by the assessee, the name plate of another business agency "Kumkum International" was stuck and the same was also found closed. It is stated that from local inquiry, it was ascertained that there was no entity by the name M/s Aadi Impex operating from the said address.

In view of the above facts, the Ld. DR supports the order passed by the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. The reasons of our decisions are given below.

The AO has mentioned at para 4.4 of the assessment order dated 23.03.2016 that “the assessee has also contended that as it reserves the right to cross-examine the alleged party, the revenue may produce the said party for cross-examination”. Also the Ld. CIT(A) has mentioned at page 18 of his order dated 05.10.2017 the submission of the assessee that “no opportunity to cross-examine the aforesaid party was given and therefore, there was a breach of natural justice.”

The fact remains that the AO could not get any reply to the notices sent by him u/s 133(6) dated 25.02.2016 meant for verifying the genuineness of the transactions. Also the summons issued u/s 131 of the Act to M/s Aadi Impex (Proprietor Shri Anoop Jain) through the Income Tax Inspector, could not be served because at the address provided by the assessee, the name plate of another business agency “Kumkum International” was stuck and the same was also found closed. It is mentioned by the AO that from local inquiry, it was ascertained that there was no entity by the name M/s Aadi Impex operating from the said address.

7.1 Cross-examination is allowed by procedural rules and evidently also by the rules of natural justice. Any witness who has been sworn on behalf of any party is liable to be cross-examined on behalf of the other party to the proceedings.

The Hon'ble Supreme Court in *State of Kerala vs. K.T. Shaduli Grocery Dealer* AIR 1977 SC 1627, recognised the importance of oral evidence by holding that the opportunity to prove the correctness or

completeness of the return necessarily carry with it the right to examine witnesses and that includes equally the right to cross-examine witnesses.

In *ITO vs. M. Pirai Choodi* (2012) 20 taxmann.com 733 (SC), the Hon'ble Supreme Court has held that "Order of assessment passed without granting an opportunity to assessee to cross-examine, should not have been set aside by High Court; at most, High Court should have directed Assessing Officer to grant an opportunity to assessee to cross-examine concerned witness."

In a similar case involving beneficiary of accommodation entries, the Hon'ble Bombay High Court in the case of *Om Vinyls P. Ltd. vs. ITO* [Writ Petition (L) No. 3114 of 2014] has emphasized the value of cross-examination.

7.2 In view of the ratio laid down in the decisions mentioned at para 7.1 hereinbefore, we are of the considered view that in facts and circumstances of the case, the contentious issue could be resolved by allowing the assessee an opportunity to cross-examine the party i.e. M/s Aadi Impex (Proprietor Shri Anoop Jain).

Therefore, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make an order afresh after giving opportunity to the assessee to cross-examine the above party. We also direct the assessee to file the relevant documents/evidence before the AO. Needless to say, the AO would give reasonable opportunity of being heard to the assessee, before finalizing the order.

As the matter has been restored to the file of the AO to make a *de novo* order, we are not adverting to the case laws relied on by the Ld. counsel.

8. The grounds of appeal filed by the assessee for AY 2011-12 (ITA No. 323/Mum/2018), AY 2012-13 (ITA No. 324/mum/2018) and AY 2013-14 (ITA No. 347/Mum/2018) are similar to AY 2010-11.

9. On the other hand, the grounds of appeal filed by the Revenue for AY 2012-13 (ITA No. 1073/Mum/2018) and AY 2013-14 (ITA No. 1074/Mum/2018) are similar. The grounds of appeal for AY 2012-13 filed by the Revenue read as under:

- a. The Ld. CIT(A) erred in restricting the disallowance of the purchases of Rs.1,31,76,656/- shown from various accommodation entry providers to 12.5% by simply ignoring the fact that in that in this case the purchase to the tune of Rs.1,31,76,656/- themselves were bogus and the instant case was not merely a case where the parties from whom such parties were allegedly made were acting as conduit between the assessee and the actual sellers of the material.
- b. The Ld. CIT(A) erred in not appreciating the fact that the then AO called upon the assessee to prove the genuineness of the purchases to the tune of Rs.1,31,76,656/- and only after considering the submission filed by the assessee, the AO held that the impugned purchases were wholly bogus and as such, there is no finding of the fact in the assessment order if any such purchases were made by the assessee at all.
- c. The Ld. CIT(A) erred in not appreciating the fact that the apparent sellers who had issued sales bills were grossly indulged in providing accommodation entry of diamond as per their sworn depositions recorded during search & seizure action in their case and the assessee had failed to establish if such goods were received from the parties other than the persons who had issued bills for such goods.

- d. The Ld. CIT(A) erred in restricting the disallowance of the purchases to the extent of 12.5% without any cogent finding or evidence on record if the apparent sellers were not merely accommodation entry provider but were acting as conduit between the assessee and the actual sellers of the material.
- e. The Ld. CIT(A) erred in not appreciating the fact that the Hon'ble Apex Court in the case of M/s NK Proteins Ltd. v. DCIT (2017-TIOL-23-SC-IT) has held that the entire undisclosed income generated out of purchase transactions deserved to be added to total income.
- f. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the AO be restored.

10. We find that the facts in AYs 2012-13 and 2013-14 are similar. As mentioned by the Ld. CIT(A), the assessee was not given an opportunity to cross-examine Shri Anoop Jain, Proprietor of M/s Aadi Impex. At para 7.1 & 7.2 hereinbefore, we have emphasised the relevance of cross-examination in the instant case.

Facts being identical, our decision for the AY 2010-11 applies *mutatis mutandis* to AYs 2011-12, 2012-13 and 2013-14.

11. In the result, the appeals are allowed for statistical purposes.

Order pronounced in the open court on 29/03/2019.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER
Mumbai;

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Dated: 29/03/2019
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai