

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, HON'BLE ACCOUNTANT MEMBER**

ITA NO.4864/MUM/2017 (A.Y: 2007-08)

Income Tax Officer – 19(3)(5) Room No. 201 Matru Mandir, Tardeo Road, Mumbai – 400 007	v.	Shri Umeshbhai R. Patel Prop: M/s. Uma Gems 117/A, Pancharatna, Opera House Mumbai – 400 004 PAN: ACFPP 2969 N
(Appellant)		(Respondent)

Assessee by : None
Department by : Shri Rajeev K. Gubgotra

Date of Hearing : 27.02.2019
Date of Pronouncement : 26.04.2019

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals) – 30, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 30.03.2017 in restricting the disallowance to 5% of the purchases as against entire purchases disallowed as non-genuine/bogus by the Assessing Officer.

2. In spite of issue of notice none appeared on behalf of assessee nor any adjournment was sought. Ld.DR filed a letter dated 25.02.2019 providing the proof of service of notice on the address last given by the assessee. The letter dated 06.02.2019 addressed by Income Tax Officer who served the notice stated that the notice was served to one Shri Sunil Arolkar who is the Accountant of the assessee and the assessee is now residing in Gujarat. As the assessee is not coming forward to prosecute the appeal though notice is served, we proceed to dispose of the appeal on hearing Ld.DR.

3. The Ld.DR submitted that the assessment was reopened u/s. 147 of the Act based on the information received from the DGIT(Investigations), Mumbai that the assessee company is beneficiary of bogus purchases made from the entity i.e M/s. Natasha Enterprises operated/managed by Shri Shri Praveen Kuman Jain Group. During the course of search in the case of Shri Praveen Kumar Jain Group they have admitted in the statement taken on oath u/s. 132(4) of the Act that they have indulged in providing accommodation entries and also admitted that these are paper companies with no real business transactions. Based on this information the assessment was reopened and in the course of reassessment proceedings assessee was required to prove the genuineness of the purchases made from the entity M/s. Natasha

Enterprises operated by Shri Praveen Kumar Jain Group. Assessee furnished its submissions along with purchase bills of M/s. Natasha Enterprise, Corresponding Sales, invoices, copies of labour charges bill, copy of bank statements reflecting the payments made to the supplier, stock book, confirmation of accounts from the supplier and submitted that the purchases made by the assessee are genuine.

4. The Assessing Officer not convinced with the submissions of the assessee concluded that the transaction made with the entity M/s. Natasha Enterprises managed by the Shri Praveen Kumar Jain group is only providing accommodation entries to the beneficiaries and assessee is one among such beneficiaries, assessee has obtained bogus bills from Shri Praveen Kumar Jain group concerns. Therefore, he concluded that the assessee obtained only the bogus bills without movement of goods and goods were purchased in gray market by paying cash. Therefore, taking note of all these facts into consideration the Assessing Officer disallowed the entire purchases of ₹.2,69,02,348/- made by the assessee from M/s. Natasha Enterprises was brought to tax accordingly.

5. On appeal Ld.CIT(A) considering various judicial pronouncements and further taking note of the report of the task group for Diamond Sector Submitted to Department of Commerce wherein the net profit margin in diamond manufacturing and trading was reported in the range of 1.5% to

4.5% and 1% to 3% respectively, he concluded that, as the assessee is trader in polished diamonds margin from such impugned purchases at 5% is appropriate.

6. Ld. DR vehemently supported the orders of the Assessing Officer.

7. We have heard the Ld. DR, perused the orders of the authorities below. In this case the assessment was reopened based on the information from the DGIT(Investigations), Mumbai that assessee is a beneficiary from the entities operated by Shri Praveen Kumar Jain Group wherein the search took place and it was found that Shri Praveen Kumar Jain Group were providing only accommodation entries and there were no actual sale transactions and the assessee could not prove the movement of goods from the suppliers to the assessee. In the absence of delivery challans, proper stock records and based on the depositions of the suppliers that they have provided only accommodation bills, the Assessing Officer has rightly concluded that the assessee has obtained only bogus bills and assessee might have purchased goods in gray market. The Assessing Officer treated the entire purchases from M/s. Natasha Enterprises as non-genuine which the Ld.CIT(A) restricted to 5% taking note of the report of the Task Group for Diamond Sector submitted to the Department of Commerce observing as under: -

“7.3 I 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 appellants case, Ld. AO has not made independent verifications nor he has to issue notice u/s. 133(6)/ 131 of the IT. 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 Pravin Kumar Jain their family members. They have also admitted that they are only giving accommodation entries to several parties and 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 Pravinkumar 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. At the same time the AO has not disputed the sales made and stated that appellant disguised the non-genuine purchases by showing low yield and higher rejections. However the AO has not given any comparative cases in the similar line of business, to prove that in the appellant's case the yield shown is low and the rejection loss is very high. In my considered opinion, by giving a generalized statement that the diamond manufacturer can disguise the non-genuine purchases by showing low yield and higher rejection losses and considering the total amount of purchases is not correct way to make the addition. In view of the same, in the present case there is every possibility of making the purchases from the grey market by paying cash and as the bills are not available for such transactions, obtain bills from Shri Pravin Kumar Jain. 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 studying the test of human probabilities. The Hon'ble court also held that, it is no sought 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 recitals 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 IT. 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 had miserably failed to lead the evidence. The Hon'ble Supreme Court, in the case of *Chuharmal v. CIT* [1SS8] i72_ILR_250 /_3£ lexman 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.**

7.8 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 Pravin Kumar Jain Group, by stating that diamond manufacturers disguise the non-genuine purchases by showing low yield and high rejections, without giving any concrete evidence/comparable cases of the similar business to prove the same. For the reasons stated, AO considered for addition, the entire amount of purchases made from M/s Natasha Enterprises Pvt Ltd. Without making the purchases, it is not possible to manufacture and sell the goods. 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.

7.9 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 facts, the Hon'ble Gujarat 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 industry about 2.5% is the profit margin. Therefore, respectfully following the decisions of the co-ordinate

bench pronounced on identical circumstances, we hereby 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."

7.10 *The motive behind obtaining bogus bills thus, appears to be inflation of purchase price so as to suppress true profits. Considering the facts of the case as well as the various case laws cited (supra) especially in the case of **CIT vs. Simit P. Sheth (supra)**, it is apt to estimate 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 in the line of business.*

7.11 *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. 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%. 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, the profit margin in this sector is around 2 to 3 percent depending on the activity of trade/ manufacturing and the taxes saved is around 1%, but in the present case AO clearly stated that the appellant failed to establish one-to-one correlation of the purchases made from the said party. In view of the same, in my considered opinion, if the addition is sustained to the extent of 5% of the purchases made as the profit element embedded in such purchases from M/s Natasha Enterprises, belonging to the Pravin Kumar Jain Group concerns, it will meet the ends of justice. The addition @ 5% is worked out at ₹.13,45,117/-, on the total purchases from M/s Natasha Enterprises, of ₹.2,69,02,348/-. Therefore Ld. AO is directed to restrict the addition to that extent, towards the non-genuine purchases, made from M/s Natasha Enterprises."*

8. On a careful consideration of the totality of facts and circumstances and the findings of the Ld.CIT(A), we do not see any valid reason to interfere with the findings and the decision arrived at by the Ld.CIT(A) in estimating the Gross Profit at 5% of the bogus purchases as the profit element embedded in such purchases from M/s. Natasha Enterprises. Thus, we uphold the order of the Ld.CIT(A) in restricting the Gross Profit at 5% of the bogus purchases.

9. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on the 26th April, 2019

Sd/-
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Mumbai / Dated 26/04/2019
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum