

IN THE INCOME-TAX APPELLATE TRIBUNAL “C” BENCH MUMBAI

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 1082/Mum/2019 (Assessment Year 2009-10)

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| Ostwal Diamonds Pvt. Ltd. Office No. 201/1A Wing, Ostwal Park, Jesal Park, Bhayander (E)-401105. PAN: AAACO4853A | Vs. | PCIT(1), Ashar I.T.Park, 6 th Floor, B Wing, Road No. 16-Z, Wagle Industrial Estate, Thane (W)-400604. |
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Appellant

Respondent

Appellant by : Shri Rajesh Shah (AR)

Respondent by : Shri Awungshi Gimsen (CIT-DR)

Date of Hearing : 22.04.2019

Date of Pronouncement : 22.04.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of Id. Principle Commissioner of Income-tax (hereinafter referred as Id. PCIT), Mumbai dated 04.02.2019 passed under section 263 of the Income Tax Act (the Act) for Assessment Year 2009-10. The assessee has raised the following grounds of appeal:

(1) The Id. Pr CIT has erred in passing the order under section 263 of the IT Ac, 1961.

(2) The Id Pr CIT has erred in issuing the notice under section 263 on the basis that addition on account of unapproved purchases should be atleast 6% instead of AO taken 3%.

(3) The Id. Pr CIT has erred in passing order under section 263 of the Act for the reason that addition should be 100% of unapproved purchases.

(4) The ld. Pr CIT has erred in passing the order under section 263 of the Act on the basis of change of opinion.

(5) The ld. Pr CIT has erred in passing the order under section 263 of the Act, without bringing any material on record except the statement of third party.

2. Brief facts of the case are that the assessee is a Private Ltd Company engaged in the business of trading in a Diamond, filed its return of income for Assessment Year 2009-10 on 14.02.2009 declaring total income of Rs. 7,23,759/-. The assessment was completed under section 143(3) on 16.11.2011. Subsequently, the assessment was re-opened under section 147 on 31.03.2016 on the basis of information received from DDIT, Central Circle-8(3), Mumbai dated 14.03.2016 that the assessee has obtained accommodation entries from Gautam Jain & Ors. Notice under section 148 was issued on 31.03.2016. In response to the notice under section 148, the assessee filed its reply dated 13.07.2016 and contended that the return filed originally on 14.02.2009 under section 139(1) may be treated as return in response to the notice under section 148 of the Act. The assessing officer proceeded to complete the re-assessment proceedings. The re-assessment was completed on 28.07.2016 under section 143(3) r.w.s. 147. The Assessing Officer while passing the assessment order noted that assessee has recorded that assessee has received accommodation entries from three parties namely M/s Krishna Diamonds Pvt. Ltd., M/s Mihir Diamonds and M/s Simran Gems aggregating of Rs. 1,75,62,371/-. The Assessing Officer

disallowed 3% Rs. 175,62,371/- of the alleged impugned/ disputed/ accommodation entries. The Assessing Officer worked out the disallowance of Rs. 5,26,871/-. The Assessing Officer made disallowance of 3% of alleged bogus purchases on taking view that only the profit element embedded in such accommodation entries should be disallowed and not the entire purchases.

3. The Id. PCIT set-aside the assessment order passed under section 143(3) read with section 147 dated 28.07.2016 and directed the Assessing Officer to frame the fresh assessment order after thoroughly and properly examining the facts. The Id Pr CIT also held that the assessment order passed by Assessing Officer is erroneous and in so far as it is prejudicial to the interest of revenue. The Id. PCIT further held that no specific reason has been given by Assessing Officer as to why the disallowance was restricted @ 3% of the purchases. The Id PCT also held that Assessing Officer has passed the order in a casual manner by disallowing 3% of purchases against the 100% addition. Thus, aggrieved by the order of Id. PCIT, the assessee has filed the present appeal before us.
4. We have heard the submissions of the Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue and also perused the material available on record. We have also deliberated on the various case laws relied by Id. Representative of the parties. The Id. AR of the assessee submits that assessment for

assessment year 2007-08 was re-opened under section 147 on the basis of same information that the assessee is beneficiary of accommodation entry. Similarly the assessment order for assessment years 2008-09 was revised by Id. Pr CIT under section 263 for Assessment Year 2008-09. However, on appeal before Tribunal the re-assessment proceedings for assessment year 2007-08 was declared as invalid, the addition was also deleted on merit and the revision order for assessment year 2008-09 was set-aside vide order dated 01.03.2019 by Tribunal in ITA No. 3653/Mum/2017 & 2270/Mum/2018 dated 01.03.2019.

5. The Id. AR of the assessee further submits that original assessment for the year under consideration was completed under section 143(3) was on 16.11.2011. Subsequently the assessment was re-opened on the basis of information received from DDIT, Mumbai. The re-assessment was completed on 28.07.2016. In the re-assessment proceeding, the Assessing Officer thoroughly examined the issue and restricted the disallowance of alleged bogus purchases @ 3% of the impugned / disputed purchases. The Assessing Officer was satisfied with the books of account. The books of account were not rejected by the Assessing Officer. The sale of the assessee was not doubted by assessing officer. The Assessing Officer made addition of 3% of the impugned purchases only by taking view that only profit embedded therein is liable to be disallowed. The assessee filed appeal before the Id. CIT(A), Thane and

the appeal was pending adjudication, when the order was revised. Therefore, when the similar issue was pending adjudication before the First Appellate Authority (FAA), the Id. PCIT was precluded from exercising the power under section 263 of the Act. The Id. AR further submits that the Id. Pr CIT has not made any enquiry on the issue and just on the basis of information provided by Investigation Wing passed order under section 263 of the Act. The Id. PCIT has only information from Investigation Wing and not made any enquiry of his own, thus, in absence of making relevant enquiries for determining the order of Assessing Officer as erroneous and prejudicial to the interest of revenue, the provision of section 263 cannot be invoked. In support of his submission, the Id. AR of the assessee relied upon the decision of jurisdictional High Court in CIT vs. Nirav Modi [389 ITR 42 (Bom)]. The Id. AR of the assessee also relied upon the order of CBDT Instruction No. 2/2018 dated 22.02.2008 wherein for Financial Year 2008-09, the CBDT issued instruction for assessment procedure for assessee engaged in Diamond Manufacturing/Trading that if assessee has shown income 6% or higher for his total turnover for a particular Assessment Year, the Assessing Officer shall accept his trading result.

6. On the other hand, the Id. DR for the revenue supported the order of PCIT.

7. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have noted that initially original assessment for Assessment Year 2009-10 was completed under section 143(3) accepting the return income offered by the assessee. The assessment was re-opened on 31.03.2016 under section 147. Notice under section 148 dated 31.03.2016 was served on the assessee. The assessee in response to the notice under section 148 filed his reply dated 13.07.2016, wherein the assessee requested to treat the return filed originally under section 139(1) as a return in response to the notice under section 148. During the re-assessment proceeding, the Assessing Officer on the basis of information received from investigation wing noted that the assessee has received accommodation entry from Gautan Jain & Co. who were providing purchase bills. The assessee has allegedly received bill from M/s Krishna Diamonds Pvt. Ltd. of Rs. 84,71,715/-, M/s Mihir Diamonds of Rs. 32,64,448/- and M/s Simran Gems of Rs. 58,26,208/- , total of Rs. 1,75,62,371/-. The Assessing Officer issued show-cause notice dated 12.07.2016 as to why the said purchases of Rs. 1,75,62,371/- should not be added to the income of the assessee. The assessee filed its reply dated 20.07.2016, the contents of reply of assessee is recorded by Assessing Officer in paragraph no. 5.1 of the assessment order. In the reply, the assessee in sum and substance contended that during the original assessment, the details were submitted

and duly verified by Assessing Officer and after verification of assessment order was passed. The alleged purchases cannot be treated as bogus purchases as the same were sold. Sales are recorded in the stock register, which was submitted during the original scrutiny proceeding. The addition is proposed on the basis of information of DDIT, Unit-Mumbai, which conducted the search on the concern of Gautam Bhanwarlal Jain group on 03.10.2013. The statement of Gautam B Jain recorded under section 132(4) on 29.10.2013, 11.10.2013 and on 02.12.2013 was retracted by him on 03.12.2013. The copy of retraction was furnished. The assessee affirmed that no addition on the basis of retracted statement can be made. The Assessing Officer after considering the material concluded that the assessee has made purchases from other supplier and tried to give the purchases a colour of genuineness. The assessee obtained invoices from the concerns/ parties. The Assessing Officer took his view that in order to apply the test of human probability for deciding the genuineness or otherwise the particular transaction. In such matter, as a natural corollary, not the entire amount covered under the transaction but the profit element embedded therein should be subjected to tax, therefore, the Assessing Officer disallowed 3% of alleged impugned/bogus purchases. In our view after considering the facts of the case, the assessing officer has taken one of the possible view.

8. Now, turning to the order passed by Id. Pr CIT. We have noted that the Id. PCIT issued show-cause under section 263 dated 24.08.2018. In the show-cause notice, the Id. PCIT contended that assessment was completed on 28.07.2016 by assessee total income at Rs. 12,50,630/- against the return income of Rs. 7,23,759/- by making addition on account of unproved purchases of Rs. 5,26,871/-. The Id. PCIT also contended that at least 6% estimation of profit of total unproved purchases is acceptable under normal circumstances as per CBDT Instruction No. 2/2008 dated 22.02.2018. On the basis of above two observations, the Id. Pr CIT took the view that assessment order is erroneous in so far as it is prejudicial to the interest of revenue.
9. In response to the show cause notice under section 263, the assessee filed its reply dated 09.10.2018. In the reply, the assessee contended that the assessment was completed under section 143(3) r.w.s. 147 on 28.07.2016, wherein the Assessing Officer made the addition of Rs. 5,26,871/-, being 3% of alleged bogus purchases. The assessee also contended that they have filed appeal against such addition before the Id. CIT(A), Thane. The assessee further contended that they have provided full details of purchases and sales with quantitative details. The payments were made by account payee cheques. The assessee also furnished the confirmation of the account. The Assessing Officer has not pointed out any defects in the books of account nor any evidence in

support of his claim/obligation to treat the bogus purchases except the statement recorded under section 132(4) of the supplier. The assessee further contended that if two possible views are possible, revision order under section 263 is not valid.

10. The reply of assessee was not accepted by Id. Pr CIT holding that in case of Gautam Jain, it was established that he had provided accommodation entry for purchase bills and no real business activity was done by them. The statement of Gautam B. Jain recorded under section 132(4) itself is concrete evidence. For CBDT Instruction No. 2/2018 dated 22.02.2008, the Id. PCIT concluded that paragraph-8 clearly states that it is not applicable on search and seizure action under section 132. The Id. PCIT after referring the statement of Gautam Jain concluded that the assessment order dated 28.07.2016 is erroneous in so far as prejudicial to the interest of revenue. The assessment order was set-aside with the direction to the Assessing Officer to frame the assessment order denovo.
11. We have noted that for assessment order for Assessment Year 2007-08, the assessment was initially completed under section 143(3) of the Act. Thereafter, on the basis of information of DDIT assessment was re-opened on similar information received from DDIT on 28.03.2014, the assessment was re-opened and was completed under section 143(3) r.w.s. 148 on 31.03.2015. The Assessing Officer made the addition on entire purchases i.e 100% of impugned purchased. However, on appeal before

the Id. CIT(A), the addition was restricted to 6%. On further appeal before the Id. Tribunal, the re-assessment was held as invalid as re-opening was made after expiry of four years from the end of relevant Assessment Year and the department failed to show that there was any failure on the part of assessee to disclose fully and truly all material facts. Even on merit, the entire addition was deleted vide order dated 01.03.2019 in ITA No. 3653/Mum/2017. Further, for Assessment Year 2008-09, the assessment order passed under section 143(3), wherein the Assessing Officer made the addition of 3% of alleged bogus purchases from the same parties. The assessment order was revised by Id. PCIT. The Id. CIT(A) directed to make the addition of 100%. However, on appeal before the Tribunal, the order passed by Id. PCIT under section 263 was set-aside vide order dated 01.03.2019 vide ITA No.2279/Mum/2018.

12. The Hon'ble Apex Court in case of Malabar Industrial Co. (343 ITR 83 SC) held that where two views are possible and the assessing officer adopts one of the view possible in law, then the order cannot be treated as erroneous or prejudicial to the interest of revenue, unless the view taken by assessing officer is unsustainable and in law. The Hon'ble Bombay High Court in case of Gabriel India Ltd (203 ITR 108 Bom) has held that Commissioner cannot initiate proceeding with a view to starting fishing and roving enquiries in matters or orders which are

already concluded. There must be material on record to show that tax which was lawfully exigible has not been imposed if claim was allowed by the Income tax officer. On being satisfied with the explanation of the assessee, such decision of the Income tax Officer cannot be held to be 'erroneous' simply because in his order he did not make an elaborate decision in that record. The Hon'ble High Court further held that when Commissioner himself, even after initiating proceeding for revision and hearing of the case, could not say that the disallowance of the claim of the assessee was erroneous and simply ask the assessing officer to re-examine the matter, which was not permissible.

13. In our view while exercising the power under section 263 of income tax Act the learned Pr.CIT should be able to demonstrate that the decision taken by the assessing officer was not possible being legally unsustainable and incorrect and this finding must be recorded. Mere conclusion of learned Pr CIT that order of assessing officer is erroneous and direction to the assessing officer to pass assessment order afresh is not correct. In the present case the assessing officer has made complete inquiry and takes a decision to disallow only 3% of the impugned purchases. Even in cases where there is inadequate enquiry but not lack of enquiry, the learned Pr CIT must give and record finding that order/enquiry made by assessing officer is erroneous. This can happen if any enquiry and verification is conducted by the learned Pr.CIT and he is

able to establish and show the error or mistake made by assessing officer making the order unsustainable in law. In our view the order passed by assessing officer is not erroneous. The matter cannot be remitted for fresh decision to the assessing officer to conduct further enquiries without a finding that order is erroneous and the learned Pr. CIT must also satisfy both the limbs of provision that the order is not only also prejudicial but prejudicial to the interest of revenue.

14. In view of the above discussion, the assessing officer in the course of assessment proceeding has taken one of the possible views thus the revision proceeding initiated by learned Pr.CIT under section 263 is invalid. Thus the ground of appeal raised by assessee is allowed.
15. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 22/04/2019.

Sd/-
G.S. PANNU
VICE-PRESIDENT
Mumbai, Date: 22.04.2019
SK

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "C" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai