

IN THE INCOME TAX APPELATE TRIBUNAL

DELHI BENCH "A": NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

AND

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 5498/DEL/2017

A.Y. : 2007-08

ASHOK KUMAR JAIN,
PROP. A.L. JEWELLERS,
SHOP NO. 4, GROUND FLOOR,
SUNDER NAGAR MARKET,
NEW DELHI - 110 003
(PAN: AAPPA3892P)

vs.

ACIT, CIRCLE 52(1)
NEW DELHI
ROOM NO. 1405,
14TH FLOOR, E-2 BLOCK
PRATYAKSH KAR BHAWAN,
CIVIC CENTRE, JLN MARG,
NEW DELHI - 2

(Appellant)

(Respondent)

ITA No. 5712/DEL/2017

A.Y. : 2007-08

ACIT, CIRCLE 52(1)
NEW DELHI

vs.

ASHOK KUMAR JAIN,
PROP. A.L. JEWELLERS,
SHOP NO. 4, GROUND FLOOR
SUNDER NAGARG MARKET,
NEW DELHI - 3

(APPELLANT)

(RESPONDENT)

Assessee by : Sh. Anil Kumar Sujanti, CA
Department by : Smt. Naina Soin Kapil, Sr. DR.

ORDER

PER H.S. SIDHU, JM

These are the cross appeals filed by the Assessee and the Revenue emanate out of the Order of the Ld. Commissioner of Income Tax (Appeals)-18, New Delhi dated 27.6.2017 pertaining to assessment year 2007-08. Since the issues involved in these appeals are common and identical, hence, the appeals were heard together and are being consolidated

by this common order for the sake of convenience, by first dealing with Assessee's Appeal No. 5498/Del/2017 (AY 2007-08).

2. The grounds raised by the Assessee read as under:-

1. The order of Ld. CIT(A) dt. 22/6/2017 is illegal, erroneous & liable to be quashed.
2. The Ld. CIT (A) has erred in not noting that the appeal against the order of assessment dt. 19/2/2015 has raised several grounds & issues which are rejected arbitrarily or by relying on citations distinguishable on facts of the assessee or by not accepting the citations cited by the assessee applicable on the facts of the assessee.
3. The Ld. CIT (A) has not adjudicated the ground of appeal No. 6 particularly agitating for not providing collected material, if any & statements retracted in spite of written request for rebuttal.
4. The Ld. CIT(A) has erred on facts and in law in ignoring the chain of original documents for import of diamonds by Sh. Praveen Jain/Nilesh Parmar group available with tax authorities in collected & seized material at the time of search as per the disclosure of said facts by Nilesh Parmar in his affidavit for retraction of the statement made u/s 132(4) being clinching evidence of procurement of diamonds from importers for making

the genuine supplies from the same by M/s Mohit International to the assessee.

5. The Ld. CIT(A) has erred on facts and in law in confirming an above addition by treating conclusive 'general admission & description in the relevant extract of the statements u/s 132(4) of Praveen Kumar Jain prop, of M/s Mohit International provided to the assessee which was recorded on the back of the assessee & without providing an opportunity of confronting & cross-examination of the concerned persons to the assessee.
6. The Ld. CIT(A) has erred on facts and in law in not adjudicating the question of evidential value of the said recorded statement u/s. 132(4) of Sh. Praveen Jain / Nilesh Parmar without any incriminating material found in their possession or control at the time of search, which is the basis of addition.
7. The Ld. CIT(A) has erred in facts and in law in upholding that Rs.16,90,250/-being 25% of alleged bogus purchase of Rs.67,61,000/-would be embedded profit liable for addition.
8. The Ld. CIT (A) has erred in facts and in law by rejecting books u/s 145(3) arbitrarily / yon the basis of discrepancies keeping in view lower G.P. Rate during the year for determining the quantum of addition without looking to higher G.P. rate of

27.05% already declared in Form 3CD during the year by the assessee.

9. The Ld. CIT(A) has erred on facts and in law in confirming an arbitrarily addition of Rs. 16,90,250/-(25% of 67,61,000/-) by assuming that the assessee has got the diamond from grey market while procuring bills from accommodation entry provider.
10. The Ld. CIT(A) has erred in facts and in law in upholding the additional arbitrary addition on assumption and presumption basis of Rs. 13,522/- (0.2% of 67,61,000/-) u/s. 69C on account of alleged commission payment in trade to obtain bogus bills in cash from unaccounted sources not accounted for in cash book.

Prayer

1. The appellant / assessee craves to amend, alter and modify any of the grounds of appeal.
2. The appropriate cost be awarded to the appellant/ assessee.
3. The appellant / assessee may be allowed such additional relief as may be deemed fit and proper in case at the time of hearing of the appeal with facts and circumstances of the case

3. The following grounds have been raised by the Revenue:-

i) On the facts and in the circumstances, the Ld. CIT(A) has erred in confirming an addition to the tune of only Rs. 17,03,772/- (i.e. 25% of the addition on account of bogus purchases plus commission @1.2% on total purchases) instead of the entire bogus purchases of Rs. 67,61,000/- to account for the unproved purchases and commission for getting the accommodation entries.

ii) The Ld. CIT(A) has erred in determining the commission paid @0.2% on the value of bills of bogus purchases instead of confirming the whole addition of Rs. 17,03,772/- (Rs. 16,90,250/- + Rs. 13,522/-) made by AO.

iii) The appellant craves leave to add, alter or amend any / all the grounds of appeal before or during the course of hearing of appeal.

4. The brief facts of the case are that assessee had filed the return of income on 31.10.2007 declaring the total income of Rs. 22,47,080/-. Later on, the income of the assessee was assessed under section 143(3) of the Income Tax Act, 1961 (in short "Act") at returned income. The assessee is engaged in the business of manufacturing and trading of jewellery in

proprietorship status. Subsequently, an information was received from the office of the Addl. DIT(Inv.), Delhi-VI, New Delhi, regarding beneficiaries of accommodation entries provided by Praveen Kumar Jain group in which a search and seizure action was carried out on 01.10.2013 by Investigation Wing, Mumbai. As per the information, M/s AL Jewellers (Proprietor Ashok Kumar Jain) received accommodation entries in respect of bogus purchase transaction amounting to Rs. 67,61,000/-. Accordingly, with reasonable belief that income chargeable to tax has escaped assessment and after recording reasons and approval of the competent authority, the case of the assessee was re-opened u/s. 148 of the Act and notice u/s. 148 was issued on 26.3.2014 and duly served upon the assessee. The assessee filed a copy of ITR for 2007-08 on 22.4.2014 and was provided the copy of reasons and approval. Notice under section 143(2) of the Act was also issued to the assessee on 26.5.2014 and duly served upon the assessee. The assessee vide his reply dated 10.12.2014 raised objection to the assessment proceedings u/s. 147/143(3) and the same was removed vide letter dated 15.12.2014. The assessee filed a supplementary rejoinder dated 29.12.2014 to the objections raised earlier and the same were removed by another order dated 01.01.2015. In response to the notices, the AR of the Assessee attended the hearing from time to time and submitted the relevant details / submissions. After considering the same, the AO observed that assessee was issued show caused vide order sheet entry dated 13.1.2015 as to why the

purchases of Rs. 67,61,000/- from M/s Mohit International should not be considered as bogus purchase expense and be disallowed considering submission of Sh. Praveen Kumar Jain and Sh. Nilesh Parmar, Proprietor, M/s Mohit International which is mere an accommodation entry. In response to the same, the assessee filed its reply which was considered by the AO and was not found tenable. AO observed that the assessee being beneficiary of bogus accommodation entries would definitely record inventories in stock register as well as would make payments through account payee cheques so as to book bogus purchase expenses. Moreover, the statement of Sh. Parveen Kumar Jain and Sh. Mr. Nilesh Parmar (Proprietor, M/s Mohit International) was recorded on oath and without any threat, coercion, pressure or force under the relevant provisions of the Income Tax Act, 1961. AO further observed that the affidavit provided by these parties at this stage is an afterthought and proves that the assessee as well as the parties are in a collaboration to evade taxes. AO further observed that Sh. Pravin Kumar Jain in his statement recorded on oath u/s. 132(4) of the Act admitted that he is indulged in providing accommodation entries and also explained the complete modus operandi of providing such entries. AO further observed that the statement of Sh. Nilesh Parmar, Proprietor of M/s Mohit International, was also recorded under section 131 of the Act on 02.10.2013 wherein, he admitted that M/s Mohit International is indulged in providing the accommodation entries only and no genuine business activity is carried

out by them and therefore, the alleged purchase are thus nothing but mere accommodation entries and no real purchase transaction has occurred in this case. AO by relying upon the decision of the Hon'ble Delhi High Court in similar case of bogus purchase in the case of CIT vs. La Medica 2001 250 ITR 575 wherein, *it was held that "when there are evidences to suggest that fictitious arrangement has been made to inflate the purchases, AO is right in treating the purchases as bogus within the meaning of section 37 of the Act."* Accordingly, the purchases of Rs. 67,61,000/- being bogus accommodation entries were disallowed and added back to the income of the assessee by assessing the income of the assessee at Rs. 90,08,800/- u/s. 147/143(3) of the Act vide order dated 19.02.2015. Against the assessment order dated 19.2.2015, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 27.06.2017 has partly allowed the appeal of the assessee. Aggrieved with the impugned order dated 27.6.2017, assessee and revenue both are in cross appeal before the Tribunal.

5. Ld. counsel for the assessee has submitted that Ld. CIT (A) has erred in not noting that the appeal against the order of assessment dt. 19/2/2015 has raised several grounds & issues which are rejected arbitrarily or by relying on citations distinguishable on facts of the assessee or by not accepting the citations cited by the assessee applicable on the facts of the assessee. It was further submitted that Ld. CIT (A) has not adjudicated the ground of appeal No. 6 particularly agitating for not providing collected

material, if any & statements retracted in spite of written request for rebuttal. It was further submitted that Ld. CIT(A) has ignored the chain of original documents for import of diamonds by Sh. Praveen Jain/Nilesh Parmar group available with tax authorities in collected & seized material at the time of search as per the disclosure of said facts by Nilesh Parmar in his affidavit for retraction of the statement made u/s 132(4) of the Act being clinching evidence of procurement of diamonds from importers for making the genuine supplies from the same by M/s Mohit International to the assessee. It was further submitted that Ld. CIT(A) has erred in confirming an above addition by treating conclusive 'general admission & description' in the relevant extract of the statements u/s 132(4) of the Act of Praveen Kumar Jain prop, of M/s Mohit International provided to the assessee which was recorded on the back of the assessee & without providing an opportunity of confronting & cross-examination of the concerned persons to the assessee. It was further submitted that Ld. CIT(A) has not adjudicating the question of evidential value of the said recorded statement u/s. 132(4) of Sh. Praveen Jain / Nilesh Parmar without any incriminating material found in their possession or control at the time of search, which is the basis of addition. It was further submitted that Ld. CIT(A) has erred in facts and in law in upholding that Rs.16,90,250/-being 25% of alleged bogus purchase of Rs.67,61,000/-would be embedded profit liable for addition and also wrongly rejecting books u/s 145(3) arbitrarily / on the basis of discrepancies keeping

in view lower G.P. Rate during the year for determining the quantum of addition without looking to higher G.P. rate of 27.05% already declared in Form 3CD during the year by the assessee. It was further submitted that Ld. CIT(A) has wrongly confirmed the addition of Rs. 16,90,250/-(25% of 67,61,000/-) by assuming that the assessee has got the diamond from grey market while procuring bills from accommodation entry provider. It was further submitted that Ld. CIT(A) has erred in upholding the additional arbitrary addition on assumption and presumption basis of Rs. 13,522/- (0.2% of 67,61,000/-) u/s. 69C on account of alleged commission payment in trade to obtain bogus bills in cash from unaccounted sources not accounted for in cash book. In view of above submissions, Ld. Counsel for the assessee has requested to set aside the issues in dispute to the file of the AO for fresh consideration.

6. On the contrary, Ld. DR has opposed the request of the Ld. Counsel for the assessee for setting aside the issues in dispute to the file of the AO for fresh consideration. However, he stated that Ld. CIT(A) has wrongly erred in confirming the addition to the tune of Rs. 17,03,772/- (i.e. 25% of the addition on account of bogus purchases plus commission @1.2% on total purchases) instead of the entire bogus purchases of Rs. 67,61,000/- to account for the unproved purchases and commission for getting the accommodation entries. It was further submitted that Ld. CIT(A) also wrongly determined the commission paid @0.2% on the value of bills of

bogus purchases instead of confirming the whole addition of Rs. 17,03,772/- (Rs. 16,90,250/- + Rs. 13,552/-) made by the AO, hence, it was requested that the order of the Assessing Officer may be restored.

7. We have heard both the parties and perused the records especially the impugned order passed by the Ld. CIT(A). We find considerable cogency in the contention of the Ld. counsel for the assessee that that Ld. CIT (A) has not adjudicated the ground of appeal No. 6 particularly agitating for not providing collected material, if any & statements retracted in spite of written request for rebuttal. It was also noted that Ld. CIT(A) has ignored the chain of original documents for import of diamonds by Sh. Praveen Jain/Nilesh Parmar group available with tax authorities in collected & seized material at the time of search as per the disclosure of said facts by Nilesh Parmar in his affidavit for retraction of the statement made u/s 132(4) of the Act being clinching evidence of procurement of diamonds from importers for making the genuine supplies from the same by M/s Mohit International to the assessee. It is also noted that Ld. CIT(A) has wrongly the addition by treating conclusive 'general admission & description' in the relevant extract of the statements u/s 132(4) of the Act of Praveen Kumar Jain prop, of M/s Mohit International provided to the assessee which was recorded on the back of the assessee & without providing an opportunity of confronting & cross-examination of the concerned persons to the assessee and has not adjudicating the question of evidential value of the said recorded statement

u/s. 132(4) of Sh. Praveen Jain / Nilesh Parmar without any incriminating material found in their possession or control at the time of search, which is the basis of addition. Therefore, in our considered opinion and in the interest of justice, the issues raised in the appeal are set aside to the file of the AO for fresh consideration, after giving adequate opportunity of being heard to the assessee. Our aforesaid view is fortified by the Hon'ble Supreme Court in the case of Andaman Timber Vs. CIT Civil Appeal No. 4228 OF 2006 wherein it has been held as under:

"According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order

passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in

fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause. We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.”

7.1 Accordingly, the assessee’s appeal is allowed for statistical purposes.

7.2 As regards the grounds raised in Assessee's Appeal are set aside to the file of the Assessing Officer for deciding the same afresh, accordingly, the grounds raised by the Department in its Appeal are also set aside to the file of the Assessing Officer, for deciding the same afresh, after giving adequate opportunity of being heard to the assessee, after considering the Assessee's appeal.

8. In the result, both the appeals filed by the Assessee as well as Revenue stand allowed for statistical purposes.

Order pronounced on 23/05/2019.

Sd/-

Sd/-

**[PRASHANT MAHARISHI]
ACCOUNTANT MEMBER**

**[H.S. SIDHU]
JUDICIAL MEMBER**

Date: 23/05/2019

SRBhatnagar

Copy forwarded to: -

1. Appellant 2. Respondent 3. CIT 4. CIT (A) 5. DR, ITAT

Assistant Registrar, ITAT, Delhi Benches