

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT

BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A. No's.624 to 629 & 637/SRT/2018

निर्धारण वर्ष/Assessment Years : 2009-10 to 14-15 & 2008-09

M/s.Gopinath Gems, 201, Siddharth Complex, Hira Baug, Varachha Road, Surat – 395 006. [PAN: AAHFG 5845 L]	Vs.	The Income Tax Officer, Ward-3(3)(1), Surat.
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by:	Shri Mehul Shah - CA
राजस्व की ओर से /Revenue by:	Smt.Anupama Singla - Ld.Sr.DR

सुनवाई की तारीख/ Date of hearing:	29.04.2019
उद्घोषणा की तारीख/Pronouncement on:	01.05.2019

आदेश / O R D E R

PER H.S.SIDHU, JM:

- These seven appeals filed by the Assessee are directed against the common order of learned Commissioner of Income Tax (Appeals)-3, Surat (in short "the CIT (A)") dated 28.09.2017, pertaining to Assessment Years 2009-10 to 2014-15 and 2008-09 respectively.
- Since common issues have been raised in all the appeals, hence, the appeals were heard together and are being disposed of by this common order for the sake of convenience, by dealing with ITA No.624/SRT/2018 in the case of M/s.Gopinath Gems and the result thereof will apply *mutatis mutandis* to other 06 appeals.

ITA No.624/SRT/2018 for A.Y. 2009-10 grounds reproduced as under :

- "1. On the facts and circumstances of the case as well as law on the subject, the learned assessing officer has erred in reopening assessment u/s.147 of the Act.*
- 2. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income tax (Appeals) has erred in partly confirming the addition of Rs.17,22,268/- out of Rs.38,23,000/- made by Assessing officer by estimating the disallowance at the rate of 12.5% of the total alleged Bogus Purchase.*
- 3. It is therefore prayed that addition made by the assessing officer and confirmed by CIT(A) may please be deleted.*
- 4. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal"*

3. At the time of hearing, Ld.Counsel for the assessee has submitted that the AO has erred on facts and in law forming a negative inference solely on the basis of extracts of statement by third parties without confronting the same to the assessee and in total disregard to the provisions of law. He stated the AO has not provided the statement of the third party on which the basis the addition was made and also not provided the opportunity of cross examination of the same. He further stated that this issue assessee has taken in Ground No.1 before the learned First Appellate Authority, the learned First Appellate Authority has adjudicated this issued by holding that the benefit of mistake of the individual officer would not be given to the Assessee by quashing the assessment in dispute. The Id.Counsel for the assessee further stated that the opportunity of cross-examine of the third person has also not been given to the assessee as well as the Assessing Officer has not made any independent enquiry and has also not followed the orders of the Hon'ble Supreme Court of India in the case of Andaman Timber Industries

[281 CTR 241] as well as the decision of Hon'ble Gujarat High Court in the case of legal representative of late Laxmanbhai S Patel [327 ITR 290]. He further stated that furnishing of copies of material collected by Assessing Officer to the assessee is a statutory requirement as provided in section 142(3) which has not been done by the Revenue Authority. Therefore, he requested that assessment in dispute may be quashed by following the decision of Hon'ble Supreme Court of India in the case of Andaman Timber Industries (supra). In support of his contention he has also filed a paper book containing page 1 to 169 in which has attached various case laws. He has also filed a second paper book containing page 1 to 91 in which he has attached notices issued by the Assessing Officer u/s.148 of the Act and copies of reasons recorded in reopening the case of the assessee for the assessment years in dispute.

4. Ld. DR relied upon the orders of the authorities below. However, he submitted that the mistake of the Assessing Officer may not be taken seriously and impugned order may be upheld by dismissing the appeals filed by the assessee.

5. We have heard the both the parties and perused the record available with us, especially the orders passed by the Revenue Authorities along with the two paper books filed by the assessee. We are of the considered view that the Assessing Officer has reopened the assessment in dispute only on the basis of statement given by the third party. No

other material has been referred by the Assessing Officer in the assessment order and the learned First Appellate Authority in the impugned order. The assessee has challenged the reopening before the learned First Appellate Authority by raising Ground No.1 which has wrongly been rejected by the learned First Appellate Authority by stating that the benefit of the mistake of an individual officer cannot be given to the assessee by deleting the addition in dispute or by cancelling the assessment in dispute. We further note that assessee has also requested for cross-examine of the third party which has also not been provided to the assessee which is in violation of principle of natural justice. Keeping in view of the aforesaid discussion and facts and circumstances of the present case, we are of the considered view that the issue in dispute has already been adjudicated and decided in favour of the assessee by the decision of Hon'ble Supreme Court of India in the case of Andaman Timber Industries vs. Commissioner of Central Excise, [2015] 281 CTR 241 (SC). The relevant portion from para 6 to 8 is reproduced as under:-

“6. 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.

7. 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.

8. 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 Notice.

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.

No cost."

6. Keeping in view of the facts and circumstances of the present case and the issue in dispute along with the documentary evidence filed by the assessee in two paper books and the decision of the Hon'ble Supreme Court of India in the case of Andaman Timber Industries (supra) it is clear that the Assessing Officer has not given any opportunity of cross-examine to the third party as well as not supplying the statement of the same to the assessee which is contrary to the principle of natural justice and the addition on this basis is not sustainable in the eye of law.

7. Respectfully following the decision given by the Hon'ble Supreme Court of India reproduced above, we are of the view that the Assessing Officer has not given any opportunity to the assessee for cross-examine to the third party of which basis the addition in dispute has been made. Respectfully following the order passed by the Hon'ble Supreme Court of India the addition in dispute is deleted by accepting the appeal filed by the assessee.

8. Since the facts and circumstances of the as aforesaid ITA No.624/SRT/2018 for A.Y. 2009-10 are identical as of facts in ITA No's.625 to 629 & 637/SRT/2018 (six appeals) for A.Y's.2010-11 to 14-15 and 2008-09 respectively, therefore the reasoning and findings given in A.Y. 2009-10 would

mutatis-mutandis apply to the remaining six appeals as mentioned. Therefore, following the same, we allow other six appeals and deleted the addition involved in these six appeals i.e. 625 to 629 & 637/SRT/2018 for A.Y's 2010-11 to 2014-15 and 2008-09.

9. In the result, all the seven appeals filed by the assessee ITA No's.624 to 629 & 637/SRT/2018 for A.Y's.2009-10 to 2014-15 and 2008-09 are allowed.

10. The order pronounced in the open court on 01.05.2019.

Sd/-
(O.P.MEENA)

Sd/-
(H.S.SIDHU)

(लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER) (न्यायिकसदस्यतथा/JUDICIAL MEMBER)

सुरत/ Surat, दिनांक Dated: 1st May , 2019/S.Gangadhara Rao, Sr.PS

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / TRUE COPY / /

Assistant Registrar, Surat