IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

I.T.A. No. 414/AHD/2012: Assessment Year: 2003-04

The Deputy Commissioner of Income Tax, Circle-9, Surat	**Vs.**	M/s. I.P. Patel & Co, A-1, 1-8, Siddhkutir Ind. Estate, Opp. Varachha Fire Station, Surat. **[PAN: AAAFI 6501 Q]**
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

I.T.A. No's. 37 & 781 /AHD/2011: Assessment Year: 2004-05

1. The Deputy Commissioner of Income Tax, Circle-9, Surat.	**Vs.**	1. M/s. I.P. Patel & Co, A-1, 1-8, Siddhkutir Ind. Estate, Opp. Varachha Fire Station, Surat **[PAN: AAAFI 6501 Q]**
2. M/s. I.P. Patel & Co, A-1, 1-8, Siddhkutir Ind. Estate, Opp. Varachha Fire Station, Surat. **[PAN: AAAFI 6501 Q]**		2. Deputy Commissioner of Income Tax, Circle-9, Surat
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

निर्धारितीकीओरसे /Assessee by	Shri Rasesh Shah, CA
राजस्वकीओरसे /Revenue by	Shri Prasenjit Singh, CIT D.R
सुनवाईकीतारीख/ Date of hearing :	17.07.2019
उद्घोषणाकीतारीख/Pronounced on:	27.08.2019

आदेश /O R D E R

PER O.P. MEENA, AM:

1. The above captioned two appeals filed by the Revenue and one appeal by the Assessee are directed against the separate orders of learned Commissioner of Income Tax (Appeals)-V, Surat [in short "the CIT(A)"] dated 03.10.2011 and 20.11.2010 for the assessment year 2003-04 and 2004-05 respectively.

2. First, we will take up Revenue appeal in I.T.A.No.414/AHD/2012. The Grounds of appeal raised by the Revenue **(In ITA No.414/AHD/2012 for A.Y. 2003-04**) read as under:-

1. *On the facts and in the circumstances of the case and in Law, the Ld. CIT(A) has erred in allowing the appeal of the assessee regarding rejecting the books of account by the A.O. u/s.145(3) of the I.T. Act, 1961.*

2. *On the facts and in the circumstances of the case and in Law, the Ld. CIT (A) has erred in deleting the addition of Rs.52,54,59,186/- made by the A.O. u/s.69C of the Act as unexplained expenditure.*

3. *On the facts and in the circumstances of the case and in Law, the Ld. CIT(A) has erred in deleting the addition of Rs.6,94,90,430/- as export of unaccounted polished diamonds.*

4. *On the facts and in the circumstances of the case and in Law, the Ld. CIT(A) has erred in deleting the addition of Rs.11,15,120/- on a/c. of theft of electricity.*

5. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting Rs.11,32,43,030/- as unaccounted production of diamonds.*

6. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A), ought to have up held the order of the A.O.*

7. *It is, therefore, prayed that the order of the Ld. CIT(A) be set-aside and that of the A.O. be restored."*

8. Grounds No.1 relates to rejection of books of accounts under section 145(3) of the Act.

9. Briefly, stated facts of the case are that the assessee firm is engaged in the business of import, export and manufacturing of diamonds. The assessee imports the rough diamonds and after getting it cut and polished, the same is exported. The assessee firm has shown gross profit of Rs.10,06,11,625/- at the rate of 4.62% on total turnover of Rs.160,70,93,608/- as against the gross profit of Rs.12,75,96,459/- at the rate of 8.55% on total sales of Rs.149,15,41,004/- shown in the preceding year. The AIR Intelligence Unit officials of the Mumbai Customs searched the baggage of Emirates passenger Manish Hiralal Kalavadiya on 21.04.2003 at the Airport, Bombay, where they have seized 5.87 carats of diamonds valued at Rs.2.79 crores that were connected to Shri Manish Hiralal Kalavadiya. Shri Bharatbhai Bodra in his statement-recorded u/s.108 of the Customs Act stated that he was to hand over the diamonds brought as above to Shri Maheshbhai of M/s. I.P. Patel & Company. Therefore, a search was carried out on 22.03.2003 in the case of M/s. I.P. Patel & Company at Panchratna Building, Mumbai where physical stock of polished diamonds of Rs.28,269.21 carats were found as against 27,997.72 carats recorded in the books. Thus, a stock was found in excess at 271.49 carats.

10. The Assessing Officer (AO) after recording the reasons of re-opening of assessment, the AO has issued a notice u/s.148 of the Act on 15.02.2010 and served upon on 16.07.2010. The reasons for re-opening were duly served upon the assessee on 24.03.2010. The objection raised by the assessee, was also disposed of by the AO. The assessee has filed a Special Civil Application No.16261 of 2010 against issue of notice u/s.148 before the Hon'ble Gujarat High Court. However, the Hon'ble Gujarat High Court decided the issue in favour of the Revenue. Thereafter the show cause notice was issued to the assessee on the basis of action taken by the Customs Department. On the basis of action taken by the Custom Authorities, and discrepancies found in the maintenance of books of accounts and other facts as discussed at page 31 to 41 of the assessment order. The AO concluded that the assessee has followed accounting system as per which the diamonds which were lying with the brokers are not entered in the books of accounts because of high number of such Jhangads. The assessee has made an application to Settlement Commission but same was not admitted by the Settlement Commission. The AO noted that the applicant Shri Mahesh Savani, partner of the assessee firm, was involved of smuggling of diamonds for the assessee M/s. I.P. Patel & Company

in violation of the provision of the Customs Act. This fact has been acknowledged by the Settlement Commission in its order. Therefore, it is proved that the assessee is misleading the Custom Department and the Income Tax Department and trying to take undue advantage of liberal provisions of laws and technicality provided taxation of unaccounted diamonds held by during the assessment year under consideration. Therefore, the AO has rejected the books of accounts u/s. 145(3) of the Act.

11. The assessee carried the matter before the ld. CIT(A). After going through the submissions of the assessee the Ld. CIT(A) as held Para 5.3 read as under:-

> *"5.3 I have gone through the assessment order and considered the submission made on behalf of assessee and perused the materials on record. Assessee has been following same method of accounting as employed in past. Assessing Officer accepted the method of accounting in the original assessment proceedings and also in past years. The same books of account as produced in the original assessment proceedings were produced in the reassessment proceedings. The books of account have been audited u/s.44AB of the I.T Act, 1961 and even the quantitative details are reflected in Form No.3CD of Tax Audit Report. Even the entries in the stock book for the production and dispatch of the polished diamonds from rough diamonds are found in the stock book maintained at Surat office. Similar type of details for receipt and sale of polished diamonds were found in the polished stock book maintained at Mumbai office. Even in the show cause noticed issued by the Custom Authority, it was entered on same day. However, it is the agreement of assessee that in all the cases, there is such variation of one day as*

diamonds are received at Mumbai office on next day. In any way, the custom authority also accepted that eh entries in both the registers have been found without any discrepancy in quantities except variation of 1 day in few cases. The polished stocks are recorded at the end of the month as labour bills are prepared at the end of the month for the sake of convenience of the assessee and labour contractors. Assessee has rebutted the contention of the assessing officer regarding the system of accounting as narrated above and therefore I am satisfied with the explanation of assessee made in this regard. Books of account u/s.145 can be rejected only when the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee, the Assessing Officer may make an assessment in the manner provided in section 144. Assessing Officer has not indicated any notified accounting standard which has not been followed by assessee. AS-1 and AS-9 are the notified accounting standards under the I.T. Act. AS-1 deals with Disclosure of accounting policies and AS-9 deals with Revenue Recognition. According to explanation given by assessee, it has followed both the accounting standards. There is no whisper in the assessment order that assessee has not followed these two accounting standards. Moreover, assessing officer has not proposed his action to rejection of books of account in the show cause notice. As a result, I am satisfied that accounts of assessee are found to be correct and complete considering the submission of assessee and also acceptance of method of accounting by Revenue in past assessment years and in original assessment. I am therefore satisfied that assessing officer wrongly rejected the books of account of assessee. Accordingly, ***the ground of appellant is allowed.***

12. Being aggrieved, the Revenue filed this appeal before us. The Ld. DR relied on the order of the AO and submitted that due to

discrepancies found in action the AO has rightly rejected the books of accounts.

13. On the other hand, the ld. counsel for the assessee relied on the order of the Ld. CIT(A). The ld. counsel further submitted that the entire exercise of re-opening issue as well as rejection of books of accounts u/s. 145(3) were carried out at the instance of the show-cause notice issued by the Custom Authority, which has been since dropped by them. Hence, CIT (A) has rightly rejected the contention of the AO. The ld. counsel filed a copy of order issued by the Central Excise Commissioner of Customs CSI Airport in file No.SD/INT/AIU/27/2003-AP"C"STFS/14-07-03/2003 Adjn. order dated 17.04.2012. Wherein, Para 10, it was held that the diamonds seized from the premises of M/s. I.P. Patel & Co. are not liable to confiscation u/s.111(d) and 111(j) of the Customs Act as proposed in the subject show-cause notice, which has been confirmed by CESTAT also .

14. We have heard the rival submissions and perused the material available on record. We find that the assessee is following the same method of accounting as employed in the past and in earlier years. The books of account were audited u/s.44AB of the Act and all the quantitative details are reflected Tax Audited Report. The CIT(A) has

given categorical finding that the books of account u/s.145 can be rejected only when the AO is not satisfied about the correctness or completeness of the accounts of the assessee, of where the method of accounting provided u/s. 145(1) and 145(2) have not been regularly followed by the AO to make an assessment in the manner provided in section 144 of the Act. Since, the assessee has followed the method as per accounting standard AS-1 and AS-9. We find that the Commissioner of Customs, Chhatrapati Shivaji International Airport, Mumbai vide order COMMR.PMS/ADJN/01/2012-13 dated 17.04.2012 [File No. SD/ INT/ AIU/ 27/ 2003-AP "C" STFS/ 14-07-03/2003] wherein, Para 10, held that the diamonds seized from the premises of M/s. I.P. Patel & Co. are not liable to confiscation u/s.111(d) and 111(j) of the Customs Act as proposed in the subject show-cause notice, which has been confirmed by Custom Excise & Service Tax Appellate Tribunal [in short CESTAT] vide order Appeal No. c/327, 328 & 744 /12 dated 09.10.2012 has also confirmed the finding of Commissioner of Customs. Therefore, the very basis of addition does not survive. Therefore, we do not find any reason to interfere with the findings of the Ld. CIT(A). Accordingly, this ground of appeal of Revenue is dismissed.

15. Ground No.2 relates to relating to addition of Rs.52,54,59,186/- made by the AO u/s. 69C of the Act as unexplained expenditure.

16. Briefly, stated the facts of the case are that during reassessment proceedings, the AO pointed out in the show cause notice issued by Jt. Commissioner of Customs, AIU, it was alleged that in certain cases, the polished stocks was entered in the stock books at Mumbai one day after the entry made in the production register at Surat. The details of such variation of one day in the dates of entry in the registers have been given in the show cause notice at Pg no.42-43. The Jt. Commissioner of Customs in the show cause notice observed that the stock of 522284.34 cut and polished diamonds was not properly accounted by I.P. Patel and Co. The Jt. Commissioner further observed that our of 52284.34 carats, 41451.6 carats of polished diamonds could be linked to the visit of Manish Kalavadiya, Bharat Bodra and Girish Bodra from Dubai few days preceding the day from entry in the books of accounts. In response to above show cause notice, assessee filed detailed reply vide letter dated 02.05.2011 which has been reproduced by assessing officer at Para no.6 of the assessment order [Page no. 35 to 38]. Assessing Officer as per his observations at Para no.7.8 of the

assessment order [Page no.42] was not satisfied with the reply of assessee and on similar reason as given in the show cause notice and the show cause notice issued by custom authorities, he made addition of Rs.52,54,59,186/- by applying average rate of Rs.100050.03 for 52284.34 carats."

17. The assessee carried the matter before the ld. CIT(A). Before ld. CIT(A), the assessee has made the following submissions which are reproduced as under:-

> *"6.2. During the appellate proceedings, the learned counsel of assessee made the following arguments in respect to the ground regarding addition of Rs.52,54,59,186/- u/s.69C as unexplained expenditure.*
>
> *(a) The labour bills have been raised by the Surat office on the Mumbai office. The labour bills are therefore kept at Mumbai office and Surat office. There is no difference in the dates of these 2 copies of the bills kept at the Surat and Mumbai office. The labour bills are the primary records on the basis of which production register is maintained at Surat office and polished stock book is maintained at Mumbai office.*
>
> *(b) The accountant at Mumbai has made the entry in the books of accounts in succeeding date when labour bills were received and he therefore has not recorded the relevant entry as per the date of the bill but as per the receipt of the bill. This is the usual practice followed by the Mumbai office from year to year. In fact; not in respect of 52,284.34 carats but in respect of all the polished diamonds of 146623.97 carats, i.e. in every case, the polished diamond has been recorded on the next day when the labour bill was received by Mumbai office on next day. In the show cause notice*

issued by Jt. Commissioner of Customs, AIU, the wrong observation was made.

(c) It is the height of perversity to link the dates of arrival from Dubai of Manish Kalavadiya, Bharat Bodra and Girish Bodra on 11.06.2002, 26.10.2002 and 29.03.2003 with the dates of entries in the polished stock books made in respect of receipt of the goods by Mumbai office from Surat office. In fact, the dates of visit and dates of entry in polished stock book doesn't match and therefore in the show cause notice issued by custom authorities, it was observed as a passing reference that these three persons arrived from Dubai few days preceding the day of entry in the polished stock book. It is just a hypothesis and hate of presumption to link these two kinds of dates although it does not match and there are so many other entries in the polished stock book when these persons didn't arrive from Dubai.

(d) No custom duty has been demanded by custom authorities on 52284.34 carats of polished diamonds. The custom authorities in the show cause notice proposed to confiscate the seized diamond of 34147.66 carats of cut and polished diamonds and they proposed to impose u/s 112 of the Customs Act, 1962.

(e) No evidence was found in the course of search by custom authorities that assessee has suppressed production of polished diamonds or made payments in respect of 52284.34 carats which was in fact, yielded from conversion of imported rough diamonds supported by proper documents.

(f) Assessing officer did not rebut the submission made by assessee and he just made the addition on the basis of observation made in show cause notice issued by the custom authorities.

(g) Thediscrepancy in the stock of polished diamond found during the course of search by custom authorities was subject matter of issue for A.Y. 2004-05 and al the additions made in A.Y. 2004-05 and in the reassessment order were deleted. No incriminating materials were found

in the course of search by custom authorities that assessee has made any investment into these diamonds. In fact, these diamonds are properly recorded in the books of assessee including stock register.

18. After going through the same, ld.CIT(A) has observed Para 6.3 as under:-

"I have gone through the assessment order and considered the submission made on behalf of assessee and perused the materials on record. From the explanation given by assessee, it is clear that in all the cases, the polished diamonds have been recorded in the stock book of Mumbai on next day. Moreover, it is the height of perversity to link the dates of arrival from Dubai of Manish Kalavadiya, Bharat Bodra and Girish Bodra on 11.06.2002, 26.10.2002 and 29.03.2003 with the dates of entries in the polished stock books made in respect of receipt of the goods by Mumbai office from Surat office. The entries in both the stock register maintained at Surat and Polished Stock Book maintained at Mumbai are supported by the documentary supporting. The polished diamonds received by Mumbai office from Surat have been exported. Polished diamonds were manufactures by Surat office through various contractors working in assessee's premise under their supervision from the rough diamond imported. The polished diamonds received from the contractors have been recorded in the stock register maintained at Surat office. Details of polished diamonds manufactured in Surat office through contractors have been placed on record by assessee. Even if there is such variation of one day, the addition solely on this basis cannot be sustained. No evidence was found in the course of search by custom authorities that assessee has suppressed production of polished diamonds or made payment in respect of 52284.34 carats which was in fact, yielded from conversion of imported rough diamonds supported by proper documents. Also, the addition made in A.Y. 2004-05 for discrepancy found by custom authority were deleted by undersigned. Moreover, assessing

officer has not rebutted the submission of assessee. Therefore, I delete the addition of Rs.52,54,59,186/- and accordingly ***this ground of appeal is allowed.****"*

19. Being aggrieved, the Revenue has filed this appeal before us. The ld. DR has supported the order of the AO and submitted to the AO was justified in his action.

20. *Per Contra,* the ld. counsel for the assessee has made addition on the basis of show-cause notice issued by the Jt. Commissioner of Customs in which it was notice that a stock of 52284.34 carats polished diamonds was not properly accounted by the assessee, therefore, the addition was made on the basis of show-cause notice issued by Customs Authority at the Rs.52,54,59,186/- by applying average rate of Rs.10050.03 for 52284.34 carats. The ld. counsel filed a copy of order issued by the Customs-Excise and Survey Tax Appellate Tribunal (in short CESTAT) vide their order dated 09.10.2012 in Order No. S/1273/12/CSTB/C-1 and A/679-671/12/CSTB/C-1 (Copy placed at paper book page 307 to 319), wherein in the case of assessee the appeal of the assessee has been allowed. Similarly, the Commissioner of Customs vides Order No. COMMR/PMS/ADJN/01/2012-13 dated 17.04.2012 (Copy placed at paper book page 322 and 327, drop the show-cause notice issued by the Jt. Commissioner of Customs. Since, the very basis of the

incomes addition of Income Tax assessment has been deleted by the Customs Authorities and confirmed by the CESTAT and therefore the ld. CIT(A) has correctly allowed the relief.

21. We have heard the rival submissions and perused the material available on record. We find that the AO has made the addition by applying gross profit at the rate in respect of cut and polished diamonds of 52284.34 carats which have been found to be order and proceeding initiated by the Custom Authorities in this regard and has been dropped then by the Custom Commissioner in his order dated 17.04.2012 (Copy placed at paper book page 322 to 337) which has been upheld by the CESTAT copy which is dated 09.10.2012 and copy placed at paper book 306 to 319. Hence, we do not find any infirmity in the order of the ld. CIT(A), accordingly the same is upheld. This ground is therefore, dismissed.

22. Ground No.3 related to deleting the addition of Rs.6,94,90,430/- as export of unaccounted polished diamonds.

23. The brief facts of the case are that according to The AO, it was established that 1961.20 carats of polished diamond exported from Surat under invoice no. 128 to 135 dated 26.12.2002 and 4953.23 carats covered by invoice no. 140 to 146 dated 20.01.2003 were exported from Surat despite the fact that the closing stock of cut and

polished diamonds at Surat from 14.12.2002 to 26.12.2002 and 30.12.2002 to 27.01.2003 was at Nil. The assessing officer made these observations from the show cause notice and he didn't change the stand from the custom authorities although, it was shown to him that the polished diamond were properly accounted in the books of accounts when assessee was having positive stock by producing books of account together with stock book and production register with filing of documentary evidence. Assessee filed detailed explanation vide letter dated 02.05.2011. However, assessing officer was not satisfied with the reply of assessee and stated that 6914.45 carats of cut and polished diamonds were clearly procured from sources other than its own and as per his observation made at para no. 7.8(B) of the assessment order [Page No. 43] and para no. 8 of the assessment order [Page No. 44] made addition of Rs. 6,94,90,430/- by applying the average rate of Rs. 10050.03. The Assessing Officer at para no. 8 of the assessment order observed that the stock statement has been prepared on 09.05.2003 and dispatch of the polished diamond starting from 01.04.2003 to 22.04.2003 were not entered in the books at Mumbai. Assessing Officer also observed that the assessee's contention that it was normal to give the diamonds weighing 5848 carats to brokers

appears to be wrong when in the F.Y. 2002-03; only 9 deals were executed through such brokers. The proportion of brokers in the month of April 2003 itself as compared to the earlier year was enough to be suspicious as being an attempt to cover up the discrepancy."

24. Being, aggrieved, the assessee filed an appeal before the Ld. CIT (A). before whom following submissions were made :

> *"7.2. During the appellate proceedings, the learned counsel of assessee made the following arguments in respect to the ground regarding addition of Rs.6,94,90,430/- as export of unaccounted polished diamonds.*
>
> *a. It is not true that assessee was not having stock to make export of polished diamond of 1961.20 carats and 4953.20 carats. The assessee was having sufficient stock at Mumbai office. Although, the exports were made through Surat Hira Bourse, Surat customs office. The said exports were made by assessee Mumbai office as can be evident from Invoices and stock book maintained at Mumbai office.*
>
> *b. The export bill was issued from Mumbai office and the bill contains the address of the Mumbai office only.*
>
> *c. At column no 28(6) of Form No. 3CD Report, the total quantity of polished diamond of 146623.97 carats was made which includes polished diamond of 1961.20 carats and 4953.23 carats. The complete quantitative details of rough, polished and rejected diamonds are given at Column no. 28(b) of the Form No, 3CD filed with ROI.*
>
> *d. The relevant details were filed in the course of assessment proceedings and were again filed in the course of re-assessment proceedings.*

e. Assessing officer has made unnecessary and unwanted presumption at para no.8 of the assessment order [Page no. 44. These observations relate to the findings of search action by custom authorities on 22.04.2003 relevant to A.Y. 2004-05. The discrepancy found during the course of search was explained properly. Although the addition was made in A.Y. 2004-05, it was deleted by ld. CIT (A) vide appellate order dated 20.11.2010 for A.Y.2004-05. Moreover, all the entries in the polished stock book at Mumbai and Surat were found to have been made for A.Y. 2003-04. Only the entries of receipt of polished diamond from Surat from 01.04.2003 till 24.04.2003 were not recorded. However, these dates fall in A.Y. 2004-05, so far as A.Y. 2003-04 is concerned, complete records were found by officer of custom authorities in the course of search. So the export of the diamonds are supported by not only the bills and accounting of the receipts of the bills but also the stock records.

f. Even the auditor has issued the audit report on 17.06.2003, i.e. immediately after the date of search by custom authorities on 22.04.2003."

25. However, CIT (A) has decided the issue in favour of the assessee as per finding given at Para 7.3 of the appellate order which are as under:-

"7.3. I have gone through the assessment order and considered the submissions made on behalf of assessee and perused the materials on record. This addition has been made under utter confusion created in the show cause notice issued by the custom authority. The export of polished diamonds of 6914 carats was made from Surat office to Mumbai office and therefore were said to be recorded in the Stock book of Mumbai office so as to export and in this regard, complete quantitative details were filed. Apparently the stock as per the stock book of Surat was Nil but it doesn't make any difference as export was made from Surat post office but by Mumbai office. At column no. 28(b) of Form No. 3CD Report, the total quantity of polished diamond of

146623.97 carats was made which includes polished diamond of 1961.20 carats and 4953.23 carats. The complete quantitative details of rough, polished and rejected diamonds are given at Column no. 28(b) of the Form no. 3CD filed with ROI. Further, assessing officer has not rebutted the submission of assessee. Hence, ***the addition made on this account is hereby deleted and the ground of appeal is allowed****."*

26. Being aggrieved, the Revenue has filed this appeal before the Tribunal. The learned D.R. supported the order of the AO.

27. Per contra, the learned counsel for the assessee supported the order of CIT (A).

28. We have heard the rival submissions and perused the relevant material on record. We find that the assessee has exported polished diamonds of 6914 carats was made from Surat office to Mumbai office and therefore were said to be recorded in the Stock book of Mumbai office so as to export and in this regard, complete quantitative details were filed. Apparently the stock as per the stock book of Surat was Nil but it doesn't make any difference as export was made from Surat post office but by Mumbai office. At column no. 28(b) of Form No. 3CD Report, the total quantity of polished diamond of 146623.97 carats was made which includes polished diamond of 1961.20 carats and 4953.23 carats. The complete quantitative details of rough, polished and rejected diamonds are given at Column no. 28(b) of the Form no. 3CD filed with ROI.

Further, assessing officer has not rebutted the submission of assessee. We find that the Commissioner of Customs, Chhatrapati Shivaji International Airport, Mumbai vide order COMMR. PMS/ ADJN/ 01/ 2012-13 dated 17.04.2012 [File No. SD/ INT/ AIU/ 27/ 2003-AP "C" STFS/ 14-07-03/2003] wherein, Para 10, held that the diamonds seized from the premises of M/s. I.P. Patel & Co. are not liable to confiscation u/s.111(d) and 111(j) of the Customs Act as proposed in the subject show-cause notice, which has been confirmed by Custom Excise & Service Tax Appellate Tribunal [in short CESTAT] vide order Appeal No. c/327, 328 & 744 /12 dated 09.10.2012 has also confirmed the finding of Commissioner of Customs. Therefore, the very basis of addition does not survive. Therefore, we do not find any reason to interfere with the findings of the Ld. CIT(A). Accordingly, this ground of appeal of Revenue is dismissed.

29. Ground No. 4 relates to deletion of addition of Rs.11,15,120/- made on account of power theft.

30. Brief facts as to how the AO observed that assessee has been indulging in power theft and out of books production resulting into unaccounted profit in view of news report in Loktej Paper on 20.01.03. The officers of Gujarat Electricity Board (GEB) conducted

an action on factory premises of assessee located at Sidhkutir Industrial Estate, Varachha resulting into detection of theft of electricity worth Rs.48 Lacs. Assessing Officer in the course of assessment proceedings, observed that GEB recovered amount of Rs.11,15,120/- in respect of different meters on account of power theft. The AO therefore, issued a show cause, in response to which the assessee vide letter dated 02.05.2011 submitted that the electricity expenses are reflected under the head of administrative expenses in audited Financial Statements. The meters of electricity although belongs to assessee but they were used by the contractors for the purpose of job work of assessee. However, The AO on the basis of the reply of the notice u/s.133 (6) from GEB and as per para no.7.8(C) of assessment order [page no.43] made addition of Rs.11,15,120/-."

31. Being, aggrieved, the assessee filed an appeal before the Ld. CIT (A). During the appellate proceedings, the learned counsel of assessee made the following arguments in respect to the ground regarding addition of Rs.11,15,120/- on account of theft of electricity:

a. *The electricity expenses are reflected under the head of administrative expenses in Audited Financial Statements. The meters of electricity although belongs to partners of*

assessee but they were used by the contractors for the purpose of job work of assessee.

b. *Assessee has not made any payment towards electricity charges or penalty on account of theft of electricity but they have been paid by the contractors.*

c. *No evidence was found in the course of search by custom authorities that assessee made payments towards electricity charges on its own or any other contractor.*

d. *In the year under consideration, supplementary bills of power theft were raised and GEB required paying 30% of bill, which was paid by the contractors as submitted above. No electricity charges of power theft or penalty were debited by assessee in its books of account and claimed as deduction. Assessing Officer in the show cause notice only proposed the addition for disallowing penalty."*

After going through the same the ld., CIT (A) held in para 8.3 as under:

"8.3. I have gone through the assessment order and considered the submissions made on behalf of assessee and perused the materials on record. The system of production of polished diamonds through job workers is being followed by assessee from last 25 years and the electricity charges of factory premises were borne by contractors only. Moreover, assessing officer has proposed addition of disallowance imposing penalty for power theft, which in fact was not claimed by assessee in his books of account. Also, assessing officer did not rebut the submissions of assessee. Accordingly, ***this ground of assessee is allowed.****"*

32. Being aggrieved, the Revenue has filed this appeal before the Tribunal. The learned D.R. relied on the order of the AO.

33. Per contra, the learned counsel for the assessee supporting the order of CIT (A) submitted a supplementary bills of power theft were raised and GEB required to pay 30% of bill, which was paid by the contractors as submitted above. No electricity charges of power theft or penalty were debited by assessee in its books of account and claimed as deduction. Therefore, Ld. CIT (A) has rightly deleted the addition so made.

34. We have heard the rival submissions and perused the relevant material on record. We find that the assessee is filing the system of production of polished diamonds through job workers is being followed by assessee from last 25 years and the electricity charges of factory premises were borne by contractors only. Moreover, assessing officer has proposed addition of disallowance imposing penalty for power theft, which in fact was not claimed by assessee in his books of account. Also, assessing officer did not rebut the submissions of assessee. In view of this matter, we do not find any infirmity in the order of CIT (A), accordingly, same is upheld. This ground is therefore, dismissed.

35. Ground No. 5 relates to deleting Rs.11,32,43,030/- as unaccounted production of diamond.

36. Brief facts of the case are that according to the AO *it was established that assessee has theft total 97,881 elect. unit during the year under consideration. In response, assessee filed a detailed submission vide letter dated 02.05.2011. However, the AO was not satisfied with the explanation of assessee and first worked out the production per unit of electricity and ultimately worked out total unaccounted production at 11267.93 carats. Assessing Officer on basis of his observation at para no.7.8 (D) of assessment order [page no.43] made addition of Rs.11,32,43,030/- by applying the average rate of Rs.10050.03."*

37. Being, aggrieved, the assessee filed an appeal before the Ld. CIT (A). During the appellate proceedings, the learned counsel of assessee made the following arguments in respect to the ground regarding addition of Rs.11,32,43,030/- as unaccounted production of diamond out of stolen power:-

a. *The electricity expenses are reflected under the head of administrative expenses in Audited Financial Statements. The meters of electricity although belongs to assessee's partners but they were used by the contractors for the purpose of job work of assessee.*

b. *The rough diamonds are processed at the premises of the contractors and they have incurred electricity expenses. Assessee has not made any payment towards electricity charges or penalty on account of theft of electricity but they have been paid by the contractors.*

c. *The contractor have given back the polished diamonds to assessee after cutting and polishing the rough diamonds as given by assessee to contractors for job work. The yield of the polished diamonds has been properly shown by assessee.*

d. *No evidence has been found in the course of search by custom authority that any yield has been suppressed by assessee.*

e. *When the rough diamonds are given for job work for cutting and polishing, the yield shown by assessee should be accepted as the transaction is supported by books of account and vouchers.*

f. *There is no evidence to the contrary found in the course of search by Custom authority that assessee suppressed any production.*

g. *The books of account cannot be rejected as per assessee's detailed submission made at point no.26.*

h. *No discrepancy in the stock was found by the custom officers in relation to A.Y. 2003-04. Moreover, the discrepancy found in A.Y. 2004-05 in the course of search by the custom officers was not actually there and the addition made in this regard by assessing officer by re-opening assessment of A.Y. 2004-05 was deleted by ld.CIT(A).*

i. *The fact that there is theft of electricity cannot lead to conclusion that there is corresponding suppression in the production.*

j. *Assessing Officer has quantified the suppression in production on the basis of production made by assessee in EOU unit. However, this cannot be compared as the quality or rough diamonds processed and polished diamond manufactured are different in both the units. Moreover, the EOU unit was started in succeeding year and not in the year under consideration.*

k. *When books of account are not rejected, the addition cannot be made for suppressed production on account of disparity in consumption of electricity as held by Kerala High Court in case*

of St. Teresa's Oil Mills vs. State of Kerala [76 ITR 365 (Ker)]. In this case, even Assessing Officer has not pointed out any disparity between production and consumption of electricity units.

l. Even otherwise, assessing officer erred in making full addition on account of suppressed production. Only the unaccounted profit on suppressed production can be taxed. In the reasons recorded u/s.148, it has been mentioned at para no.6 that assessee has been including in power theft and out of books production which has resulted in unaccounted profit. During the year under consideration. Assessee's Gross Profit Ratio is only 6.25%."

After going through the same the CIT (A) has held in para 9.3 as under:

"9.3. I have gone through the assessment order and considered the submissions made on behalf of assessee and perused the materials on record. Assessing officer has not pointed out any disparity between the productions of polished diamond with the consumption of electricity units including units on account of theft of power. Assessing officer has not correlated disparity in month-wise production with month-wise consumption of electricity. Also, no evidence has been found in the course of search by custom authority that any yield has been suppressed by assessee or unaccounted productions have been made by appellant. Even the assessing officer has not rebutted the submissions made by assessee. Moreover, these types of additions can be sustained only when books of account are rejected and in assessee's case I have already held that books of account cannot be rejected and so even on this ground addition is not sustainable and ***this ground of appeal is allowed****."*

38. Being aggrieved, the Revenue has filed this appeal before the Tribunal. the learned D.R. vehemently supported the order of the AO.

39. Per contra, Learned Counsel submitted relied on the order of the CIT (A) and submitted that the rough diamonds are processed at the premises of the contractors and they have incurred electricity expenses. Assessee has not made any payment towards electricity charges or penalty on account of theft of electricity but they have been paid by the contractors. No discrepancy in the stock was found by the custom officers in relation to A.Y. 2003-04. Moreover, the discrepancy found in A.Y. 2004-05 in the course of search by the custom officers was not actually there and the addition made in this regard by assessing officer by re-opening assessment of A.Y. 2004-05 was deleted by ld.CIT(A).

40. We have heard the rival submissions and perused the relevant material on record. We find that the AO has not pointed out any disparity between the productions of polished diamond with the consumption of electricity units including units on account of theft of power. Nor the AO has correlated disparity in month-wise production with month-wise consumption of electricity. Also, no evidence has been found in the course of search by custom authority that any yield has been suppressed by assessee or unaccounted productions have been made by appellant. Even the assessing officer has not rebutted the submissions made by assessee. Moreover,

these types of additions can be sustained only when books of account are rejected. Further, such addition was deleted in A.Y. 2004-05. We find that the Commissioner of Customs, Chhatrapati Shivaji International Airport, Mumbai vide order COMMR. PMS/ ADJN/ 01/ 2012-13 dated 17.04.2012 [File No. SD/ INT/ AIU/ 27/ 2003-AP "C" STFS/ 14-07-03/2003] wherein, Para 10, held that the diamonds seized from the premises of M/s. I.P. Patel & Co. are not liable to confiscation u/s.111(d) and 111(j) of the Customs Act as proposed in the subject show-cause notice, which has been confirmed by Custom Excise & Service Tax Appellate Tribunal [in short CESTAT] vide order Appeal No. c/327, 328 & 744 /12 dated 09.10.2012 has also confirmed the finding of Commissioner of Customs. Therefore, the very basis of addition does not survive. Therefore, we do not find any reason to interfere with the findings of the Ld. CIT (A). Accordingly, this ground of appeal of Revenue is dismissed.

41. Grounds raised by the Revenue (**In ITA No. 781/AHD/2011 for A.Y.2004-05**) read as under:-

> *1. "On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs.2,80,12,053/- made by the A.O. on account of the diamonds seized from Manish Kalavadiya acting as a carrier for the assessee after holding that the assessee did not own the diamonds ignoring the fact*

that Manish Kalavadiya was a man of low means getting salary of Rs.4500/- pm and Mahesh Savani (partner of the assessee firm) was co-applicant before Hon'ble Settlement Commissioner Customs and Central Excise Mumbai for settlement of the case, Thus, the Ld. CIT(A) failed to appreciate the intent & purpose behind Mahesh Savani, partner of the assessee acting as a Co-Applicant.

2. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs.2,80,12,053/- made by the AO on account of the diamonds seized from Manish Kalavadiya ignoring the fact that Hon'ble Settlement commission Customs and Central Excise Mumbai on the basis of facts before it had held the carrier Manish Kalvadiya was smuggling diamonds for its principal being M/s. I.P. Patel & Co.

3. On the facts and in the circumstances of the case and in law, the ld. CIT (A) has erred in deleting the addition of Rs.2,80,12,053/- made by the A.O on account of the diamonds seized from Manish Kalavadiya ignoring the fact that Manish Kalavadiya had no known source to pay the duty of Rs.83 lacs as imposed by the Custom Authorities.

4. On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition made by the assessing officer at Rs.5,88,42,198/- on account of stock discrepancy found by the AIU officials despite the fact that search by the AIU Officials yielded excess stock of 271.49 carat and no jhangads were found for stock of 5848.99 carat stated to have been given to brokers for selling on approval basis.

5. On the facts and in the circumstances of the case and in law, the ld.CIT (A) has erred in deleting the addition made by the assessing officer at Rs.5,88,42,198/- on account of stock discrepancy found by the AIU officials despite the facts that stock statement has been prepared by the assessee on

09/05/2003 well after the search action on 22/04/2003 which was nothing but an attempt to explain the discrepancy found during the search.

6. On the facts and in the circumstances of the case and in law, the ld. CIT (A) has erred in deleting the addition made by the assessing officer at Rs.5,88,42,198/- on account of stock discrepancy found by the AIU Officials despite the fact that assessee claim of dispatch of polished diamonds from Surat Office from 01/04/2003 to 24/04/2003 was not found to be entered in books of account maintained at Mumbai office.

7. On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition made by the assessing officer at Rs.5,88,42,198/- on account of stock discrepancy found by the AIU officials despite the fact that the brokers and the unnumbered jhangads produced during the inquiry proceedings were rejected as the jhangads were not found on the day of search, were not numbered and the accounting system found to be unreliable.

8. It is therefore, prayed that the order of the ld. CIT(A) be set aside and the Assessing Officer's order be restored.

42. Ground No. 1 to 3 relates to deletion of addition of Rs.2,80,12,053/- on account of diamond seized from Manish Kalvadiaya acting as carrier.

43. Brief facts are that the AO asked the assessee an explanation in respect of diamonds seized from Manish Kalavadiya for which detailed explanation was given vide letter dated 16.12.09. The AO was not satisfied with the explanation of the assessee and made

addition of Rs.2,80,12,053/- u/s.69 of the Act as per his findings given at Para no.7.6 to 7.8 of the order [pg no.19 to 20]. Assessing officer observed that Manish Kalavadiya is a man of no means. Diamonds worth Rs.2,80,12,053/- were beyond his reach. He also observed that the partner of the assessee firm was co-applicant before Settlement Commission. He further observed that Settlement Commission in its order mentioned that Manish Kalavadiya was the carrier and he was smuggling goods for his principle i.e. the appellant.

44. Being, aggrieved, the assessee filed an appeal before the Ld. CIT (A). before whom, the learned counsel for assessee submitted regarding the addition of Rs.2,80,12,053/- the goods have been released finally in case of Manish Kalavadiya. He has paid custom duty of Rs.83,11,724/- on the alleged goods and assessee or his partner does not have any benefit from the release of the goods in the hands of Manish Kalavadiya. If the goods were belonging to assessee, the custom authorities would have recovered custom duty from assessee and the goods would have been released in assessee's hands. In view of this , the ld. CIT (A) has given his findings as under:

> *"9. I have considered the arguments made on behalf of assessee and perused the material on records. Although the*

Hon`ble Settlement Commission in their order dated 8.2.2008 in case of Manish Kalavadiya, passed a remark that Shri Manish Kalavadiya was having a role as a carrier for his principal M/s. I.P. Patel & Co. for smuggling but the alleged diamonds never reached M/s. I.P. Patel. It cannot be said that assessee has made any investment in regard to the alleged diamonds seized from Manish Kalavadiya. So Sec. 69 is not applicable. As assessee has not made any investment, assessee cannot be called upon to offer any explanation about the nature and source of investment. ***No Material has been found by any authority, indicating that assessee has made any advance for illegally importing diamond through Manish Kalavadiya****. Moreover, Manish Kalavadiya owned up the diamonds recovered from the possession by Custom Authorities and paid custom duty in terms of order of Custom Authority. Before the Settlement Commission of Customs and Central Excise, the appellant has not admitted any custom duty and on that basis, his settlement application is rejected. The partner of the firm, fine or Savani was only a co-applicant. He has not paid any custom duty, fine or penalty on diamonds seized from Manish Kalavadiya by the Custom Authorities.* ***The fact that Mahesh Savani was a co-applicant does not establish the investment made by the assessee in the alleged diamonds.*** *As Shri Manish Kalavadiya was arrested at the airport carrying diamonds from Dubai, he obtained diamonds from the supplier stationed out of India. So the ownership of the goods either belongs to Manish Kalavadiya or the person who supplied the diamonds to him. So even if it is held that diamonds were meant for delivery to the appellant, no payment was received from the appellant as confirmed by Girish Bodra in statement recorded from Girish Bodra before Custom Authorities. Hence, the* ***appellant cannot be said to the owner of goods****. The was a carrier which may be man of no means but he acted on behalf of suppliers Girish Bodra/Karan International and the diamonds were belonging to them. The facts of financial status of Shri Manish Kalavadiya do not make A.O's view strong. Before me, the assessee also relied on the decision of* ***Ushakant N. Patel vs. CIT (282 ITR 553) (Guj). In this case it was held by Gujarat High Court that revenue must establish that there was an investment which was not recorded in books of accounts.*** *In other words in the first instance it is incumbent upon the Authority to establish that there were investment made by assessee. Here in this case,* ***the Assessing Officer has not***

established that there was any investment made by the appellant in the alleged diamonds seized worth Rs.2,80,12,053/-. *Following the decision of Honourable Gujarat High Court and looking to the facts and circumstances of the assessee's case,* ***it is held that the addition has been wrongly made by the Assessing Officer in case of assessee and is hereby deleted and this ground of appeal is allowed.***

45. Being aggrieved, the Revenue has filed this appeal before the Tribunal. The Ld. DR supported the order of the AO. Whereas the learned counsel for the assessee submitted supporting the order of the CIT (A) submitted that the addition made on the basis of show cause notice issued by Custom Authority has been issued in favour of the assessee by the Custom Commissioner, International, Airport Mumbai and same is also stands confirmed by the CESTAT. Hence, no addition is sustainable in law.

46. We have heard the rival submissions and perused the relevant material on record. We find that the Commissioner of Customs, Chhatrapati Shivaji International Airport, Mumbai vide order COMMR. PMS/ ADJN/ 01/ 2012-13 dated 17.04.2012 [File No. SD/ INT/ AIU/ 27/ 2003-AP "C" STFS/ 14-07-03/2003] wherein, Para 10, held that the diamonds seized from the premises of M/s. I.P. Patel & Co. are not liable to confiscation u/s.111(d) and 111(j) of the Customs Act as proposed in the subject show-cause notice, which has been confirmed by Custom Excise & Service Tax Appellate

Tribunal [in short CESTAT] vide order Appeal No. c/327, 328 & 744 /12 dated 09.10.2012 has also confirmed the finding of Commissioner of Customs. Therefore, the very basis of addition does not survive. Therefore, we do not find any reason to interfere with the findings of the Ld. CIT(A). Accordingly, this ground of appeal of Revenue is dismissed.

47. Ground no. 4 to 7 relates to deletion of addition of Rs. 5,88,42,198 on account of discrepancy found in stock by the AIU Officials. As the assessee has could not produce the Jangad on which diamonds were given. The statement presented after search was not found acceptable.

48. Brief facts are that the AO has made the addition of 6120.47 for discrepancy in stock of polished diamonds.

49. Being, aggrieved, the assessee filed an appeal before the Ld. CIT (A). Wherein it was by the Assessee by stating that diamonds of 6120.47 carats received from Surat office were not accounted in Mumbai office as the same were entered only when labour bills were prepared at end of the month. The search was also conducted at Surat office on 24.04.2003 and the stock register was found by the Custom Authorities evidencing the entries of polished diamonds sent from Surat to Mumbai. In Panchnama dated 24.04.2003 made by

Custom Authorities in connection with search, It was clearly mentioned that no incriminating documents were found in the course of search. The Custom Authorities of Surat have forwarded the computerized statement of stock register of the appellant to the Custom Authority of Mumbai along with the letter of the appellant dated 9.5.2003 received from the appellant with their forwarding letter dated 9.5.2003. The Custom Authorities of Surat did not give any adverse report regarding any discrepancy. In the course of search, the Custom Authorities did not find any discrepancy in the stock of rough diamonds. The polished diamonds were manufactured from the imported rough diamonds. The Custom Authorities or the Assessing Officer did not doubt the appellant's purchase of imported rough diamonds. If polished diamonds are not believed to have been sent from Surat to Mumbai office, then there should have been discrepancy in stock of rough diamonds but no such discrepancy regarding stock of rough diamonds was found in the course of search by Custom Authorities. No evidence was found that the rough diamonds purchased by the appellant were sold. This indicated that rough diamonds were converted into polished diamonds, particularly when purchases and labour payments were not doubted by the Assessing Officer. Also, the non-finding of

Jangads in respect of brokers is not relevant because in that case, there would have been shortage of stock and not from the appellant excess of stock. Moreover, the brokers have confirmed the receipt of diamonds from the appellant and Custom Authorities have seized the diamonds from them. Hence the assessee's version of transfer of polished diamonds of 6120.47 carats has to be accepted and accordingly the addition made by Assessing Officer of Rs.5,88,42,198/- is not proper and is hereby deleted and this ground of appeal is allowed."

50. We have heard the rival submissions and perused the relevant material on record. We find that the Commissioner of Customs, Chhatrapati Shivaji International Airport, Mumbai vide order COMMR. PMS/ ADJN/ 01/ 2012-13 dated 17.04.2012 [File No. SD/ INT/ AIU/ 27/ 2003-AP "C" STFS/ 14-07-03/2003] wherein, Para 10, held that the diamonds seized from the premises of M/s. I.P. Patel & Co. are not liable to confiscation u/s.111(d) and 111(j) of the Customs Act as proposed in the subject show-cause notice, which has been confirmed by Custom Excise & Service Tax Appellate Tribunal [in short CESTAT] vide order Appeal No. c/327, 328 & 744 /12 dated 09.10.2012 has also confirmed the finding of Commissioner of Customs. Therefore, the very basis of addition does

not survive. Therefore, we do not find any reason to interfere with the findings of the Ld. CIT(A). Accordingly, this ground of appeal of Revenue is dismissed.

51. Grounds of appeal raised by the Assessee (**In ITA No.37/AHD/2011 for A.Y 2004-05**) read as under:-

> **1.** *"On the facts and circumstances of the case as well as law on the subject, the learned CIT(Appeals) has erred in confirming the action of the Assessing Officer in assuming jurisdiction u/s.148 of the I.T. Act and thereby erred in confirming the assessment u/s.147 of the I.T. Act.*
>
> **2.** *It is therefore prayed that the above action taken by Assessing Officer and confirmed by Commissioner of Income-tax (Appeals) may be please be deleted.*
>
> **3.** *Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal."*

52. We have heard the rival submissions and perused the relevant material on record. We find that Ground No. 1 to 3 in the Cross Objection by the assessee are in supports of the order of the CIT (A). Since we have upheld the order of CIT (A) and dismissed the Revenue appeal for A.Y. 2004-05 in above part of this order. Therefore, these grounds of appeal by the assessee on reopening of assessment n din support of deletion of addition are becomes infructuous and academic in nature, hence, does not require our adjudication. Accordingly, these are ground treated as dismissed.

53. In the result, the appeal of the assessee for A.Y. 2004-05 is dismissed.

54. In the result, the appeal of the Revenue for A.Y. 2003-04 in I.T.A.No. 414/Ahd/2012 and for A.Y. 2004-05 in I.T.A.No. 781/Ahd/2011 and appeal of the assessee for A.Y. 2004-05 in I.T.A.No. 37/Ahd/2011 are dismissed.

55. The order is pronounced by listing the case on the Notice Board under Rule 34(4) of Income Tax Appellate Tribunal Rules 1963.

Sd/-	**Sd/-**
(H.S.SIDHU)	**(O.P.MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

सुरत/ Surat, दिनांक Dated: 27th August, 2019/
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / TRUE COPY / /

Assistant Registrar, Surat