IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI

BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
&
SHRI RAM LAL NEGI, JUDICIAL MEMBER
ITA No.6154, 6155, 6156, 6157 & 6158/Mum/2016
(**Assessment Years: 2009-10, 2010-11, 2011-12, 2012-13 & 2013-14**)

Sterling Jewels Pvt.Ltd. 208, A-Z Industrial Estate Ganpatrao Kadam Marg Lower Parel (W) Mumbai-400 013	Vs.	ACIT-5(3)(2) 460, Aaykar Bhawan M.K.Road, Churchgate Mumbai-400 020
PAN/GIR No.AAJCS3316D		
(Appellant)	..	**(Respondent)**

Assessee by	K.A.Vaidyalingan
Revenue by	V.Vinod Kumar
Date of Hearing	**03/10/2019**
Date of Pronouncement	**03/10/2019**

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This bunch of five appeals filed by the assessee are directed against consolidated order of the CIT(A)-10, Mumbai, dated 17/08/2016 and they pertains to Assessment Years(AY) 2009-10,2010-11,2011-12,2012-13 & 2013-14. Since, the facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed off by this consolidated order.

2. The assessee has more or less raised common grounds of appeal for all assessment years. Therefore, for the sake of brevity, grounds of appeal filed for AY 2009-10 in ITA No.6154/Mum/2016 are reproduced below:-

1. *On the facts and in the circumstances of tie case, the learned CIT(A) erred in upholding the validity of the reassessment proceedings u/s. 147, which is resorted to merely on the basis of information received from the Investigation wing of the Department and without verification of facts and without application of mind by the learned AO to the case or having her own reason to believe that any income chargeable to tax has escaped assessment which is s/ne qua non for reopening.*
2. *On the facts and in the circumstances of the case, the learned CIT (A) erred in upholding the addition made by the teamed AO u/s. 69C of the Income tax Ad (though quantum addition is reduced from 12.5% to 3% of the alleged bogus purchase made), which is purely on suspicion, surmises and conjectures and even though all evidences in support of the impugned purchases and the source of such expenditure were filed, payments having been made through banking channel.*

3. *On the facts and in the circumstances of the case, the teamed CIT (A) erred in upholding the addition made by the teamed AO u/s. 69C of the Income tax Act (though quantum addition is reduced from 12.5% to 3% of the alleged bogus purchase made), even though the statement given by Shri Pravin Kumar Jain, on which heavy reliance was placed by the learned AO for the impugned addition, has been retracted by him and therefore, the same has no evidential value.*

4. *On the facts and in the circumstances of the case, the learned CIT (A) erred in upholding the addition made by the learned AO u/s. 69C of the Income tax Act (though quantum addition is reduced from 12.5% to 3% of the alleged bogus purchase made), without giving opportunity to cross examine Shri Pravin Kumar Jain, based on whose statement, the impugned addition is made.*

The Appellant prays that (a) the reassessment proceedings be quashed or in the alternative, the addition sustained by the CIT (A), being 3% of the impugned purchases be deleted in toto or reduced substantially considering the costly nature of the goods involved.

The appellant craves leave to add, amend, alter, amplify, modify or withdraw any of the grounds of appeal.

3. The brief facts of the case are that the assessee Company is engaged in the business of Manufacturer, Exporter & Trader of studded jewellery and loose diamonds filed its return of income for AY 2009-10 on 22/09/2009 and said return was processed under section 143(1) of the Income Tax Act, 1961. Thereafter, the assessment has been reopened u/s 147 of the IT Act, 1961, for

reasons recorded as per which a search and seizer action conducted in the case of Bhanwarlal Jain group on 3-10-2013 reveled that Shri. Bhanwarlal Jain was involved in providing accommodation entries of bogus purchase bills to various parties and as per list of beneficiaries, the assessee is one of the beneficiary, who had taken accommodation bills of bogus purchases from M/s Mayur Exports amounting to Rs. 87,00,600/-. The case was selected for scrutiny and the assessment has been completed u/s. 143(3) r.w.s. 147 of the I.T. Act, 1961 on 1/03/2016 and determined total income of Rs. 25,57,930/-, after making additions towards alleged bogus purchase @ 12.50% of total purchases from said party and made additions of Rs. 10,87,575/-.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has challenged reopening of assessment on the ground that the AO had reopened assessment on the basis of third party information without verification of fact and not having applied his mind to facts of the case to ascertain escapement of income. As regards addition made towards alleged bogus purchases, the assessee has reiterated its submissions made before the Ld. AO and argued that purchases from above party is genuine, which is supported by necessary evidences. The assessee has filed all details, including books of accounts, but the Ld. AO has made additions, only on the basis of information collected during search in case of Bhanwarlal Jain group, ignoring fact that the statements given during course of search has been retracted by the parties with affidavits . The Ld. CIT(A) after considering relevant submissions of the assessee and also by relied upon various judicial precedents rejected legal ground

taken by the assessee challenging reopening of assessment. As regards addition towards alleged bogus purchases, the ld. CIT(A) after considering nature of business of the assessee and facts brought out by the AO, including information collected during search in case of Bhanwarlal Jain group and also by relied upon various case laws, including the decision of Hon'ble Gujarath High Court, in the case of Simith P. Sheth vs CIT 356 ITR 451 scaled down additions made by the Ld. AO towards alleged bogus purchases to 3% of such bogus purchases. The relevant findings of the Ld.CIT(A) are reproduced as under:-

4.2 I have gone through the facts and circumstances of the case. From the facts of the case it was noticed that the assessment originally was processed u/s 143(1) and there was no scrutiny. The assessment was reopene3d within four years except in the case of A.Y 2009-10 and it was reopened based on the information received from DI(Inv.), Mumbai after their search and seizure operation in the case of Bhanwarlal Jain group who are the entry operators and appellant company was one of the beneficiaries from the accommodation bills supplied by them. Bhanwarlal Jain group has confessed before the investigation wing of the Department in the statements taken under oath that they have not supplied any material except supplying the accommodation invoices. As the reassessment was done on the return process u/s 143(1) within a period of four years based on such external information, I hold that the reassessment proceedings are valid. The reopening beyond four years from the end of the relevant A.Y with regard to A.Y. 2009-10 is also held valid in view of the decision of the Hon'ble Bombay High Court in the case of Hitesh R.Shah (2013) 35 taxmann.com 474. The reassessment is also held valid in view of the following decisions:-

(i) The Hon'ble Gujarath High Court in the case of Rhythm Chemicals P Ltd V. ACIT, 33 taxman.com 426 has held that since intimation u/s 143(1) is not an assessment order there is no change of opinion and reopening is valid beyond four years.

(ii) The Hon'ble Delhi High Court in the case of OPG Metals and Finsec Ltd v. CIT, 358 ITR 144 has held that re-assessment is valid if the issue is not a subject matter of earlier assessment. Same view was also taken by High Court of Bombay in the case of Export Credit Guarantee Corporation of India Ltd v. Addl.CIT (30 taxmann.com 211) (2013) that reopening of an assessment is permissible even in the case of scrutiny u/s 143(3) originally when the original

assessment order passed is silent in respect of the issue/point on which re-assessment notice is issued. Further, no query with regard to the above issue having been made during the assessment proceedings would also indicate absence of application of mind to the tangible material, and reopening is valid.

(iii) It was held in the following cases that when there is no discussion on this issue and no details are called for by the AO or filed by the appellant and no findings either positive or negative in the original assessment proceedings, reopening cannot be construed as change of opinion.

1. *ALA fir vs. CIT (102 ITR 622) (Mad HC)*
2. *Ess Kay Engineering Company Pvt.Ltd. vs. CiT (247 ITR 818) (SC)*
3. *Revathi CP Equipments Ltd vs DCIT & Ors (241 ITR 856) (Mad HC)*
4. *EMA India Ltd vs. ACIT (30 DTR 82) (All.HC)*

(iv) The Hon'ble Supreme Court in the case of Kalyanji Mavji & Company v. CIT (102 ITR 287)(SC) (1976) has held that there is no change of opinion if the assessment is reopened on new facts which came to notice subsequently, even though they are already on record.

(v) The Hon'ble Gujarat High court in the case of Praful Chunilal Patel and Vasanth Chunilal Patel v. ACIT (236 ITR 832) (1999) has held that where the AO had overlooked something at the first assessment, there can be no question of any change of opinion, when the income which was chargeable to tax is actually taxed as it ought to have been under the Law but was not taxed due to an error committed at the first assessment, the reopening was held valid.

(vi) ITAT, Chennai in the case of Chennai Petroleum Corpn. Ltd. AY 2006-07 (ITA NO.66/11-12/LTU(A) dated 08.01.2013 relying on the High Court of Delhi in the case of Consolidated Photo and Finvest Ltd v. ACIT (281 ITR 394) (2006) and High Court of Mumbai in the case of Dr. Amir's Pathological Laboratory v. JCIT (252 ITR 673) has held that mere production of books of account, balance-sheet and profit and loss account will not necessarily amount to disclosure necessary for Explanation 1 of Sec 147.

(vii) High Court of Delhi n the case of Honda Siel Power Products Ltd v. DCIT (197 taxman 415)(2011) has held that merely because the material lies embedded in the material evidence which the AO could have uncovered but did not uncover ,is not a good reason for striking down reopening.

(viii) The Hon'ble High court of Mumbai in the case of Export Credit Guarantee Corporation of India Ltd v. Addl.CIT(30 taxmann.com 211) (2013) has held that there is no failure on the part of assessee to disclose material facts but there is complete failure on the part of the AO to apply his mind during original assessment to points on which assessment is reopened, reopening was treated as valid. It is further to

be understood that when it is the question of non application of mind whether it is for four years or more makes no difference.

(ix) Notwithstanding anything stated above, it is the prerogative of the AO/Revenue to reopen the assessment if the AO has found in the course of time that certain amounts which should have been brought to tax have escaped assessment. The powers were clearly enacted u/s 149 r.w.s. 151 of the Act. As per these provisions what the AO is supposed to see is whether there is an escapement of income and whether it is within four years or beyond four years and whether it is a case of 143(1) or 143(3) so as to take approval from his appropriate senior officers as per the provisions. Once the AO fulfills these requirements then he can reopen the assessment by recording the reasons. The AO will be within his jurisdiction to reopen the assessment and is jurisdiction cannot be challenged per se. Further it is to be understood that mere reopening does not mean that the AO has come to the conclusion that income has escaped.

(x) The Hon'ble High Court of Bombay in the case of Eleganza Jewllery Ltd. (2014) 52 taxmann.com 46 has held that it is a trite law that at this stage only a prima facie view of the AO is necessary to issue notices and not a cast iron case of escapement of income. Similarly views were also expressed in the following cases,

1. *High Court of Delhi in the case of Mahanagar Telephone Nigam Ltd. (2000) 112 Taxman 337*
2. *SC in the case of Central Provinces Manganese Ore co Ltd. (1991) 191 ITR 662*
3. *SC in the case of Selected Dalurband Coal Co P Ltd (1996) 217 ITR 597*

(xi) The Hon'ble High court of Bombay in the recent decisions in the following cases while dealing with bogus purchases/loans issues has ruled that the initiation of reassessment proceedings on the basis of survey operations is held valid even though there was scrutiny u/s 143(3). The opened that it will not tantamount to change of opinion:

(1) Nikunj Exim Enterprises Pvt.Ltd. (2014) 49 taxmann.com10
(2) Bright Star Syntex(P.) Ltd.(2016) 71 taxmann.com 64
(3) Naresh K.Pauja (2015) 54 taxmann.com 258 held that mere payments routing through bank channels would not by itself establish the genuineness of the gifts.
(4) Hitesh R. Shah (2013) 35 taxmann.com 474-held that reopening beyond 4 years is justified in such cases of accommodation entries which the AO is in possession of based on the investigation carried out.

4.2.1 In view of the above discussion the reopening of assessment is held valid since there was tangible material available with the AO at the time of reopening the assessment in the form of information received from the DIT investigation. Further, as the assessment is reopened based on the evidence collected and statements recorded during the course of search of 'entry provider', the AO has a reason to believe that income has escaped assessment. As such there is no change of opinion. The reopening proceedings are, therefore, upheld and the ground is dismissed.

5.2 I have carefully considered the facts of the case and submissions of the Ld. AR I have also gone through the decisions relied on by the Ld. AR. As seen from the facts of the case the AO has reopened the assessment based on the information received from the DIT(Inv.), Mumbai on the basis of search and seizure action conducted by the investigation wing during the course of which Bhanwarlal Jain and his staff members have given categorical statements clearly stating the modus operandi followed by them in providing the accommodation bills. They have also admitted unequivocally before the investigation wing that they were not involved in any real trading of diamonds except giving bogus bills to those who need them for certain commission. Having observed that those parties are non-existent sellers and they have not made any sales except the bogus invoices issued in their name, the AO has brought to tax the entire bogus purchases standing in the names of the so-called sellers, u/s 69C of the Act as the explanation given by the appellant was not satisfactory to him. Their argument was that unless the AO proves positively that the material was not delivered to the assessee and the payment made through the Bank channels have been bogus or the amounts paid in the names of the suppliers have come back to the purchaser-assessee, the AO cannot make any addition u/s 69C. Further, as the AO has not doubted the sales disclosed by the appellant he has to allow the purchases since there cannot be any sales without the purchase of the material. As was rightly pointed out by the Ld. AR when the quantity details of stock is tallying with the stock register, the purchases also cannot be doubted. The only possibility is that the appellant might have inflated its purchases by taking into account the invoices in the names of the bogus suppliers. The presumption is that the material might have been purchased from grey market at a lower rate and made good the entries with bogus bills to reduce the profits. Under similar circumstances the Hon'ble High Court of Gujarat in the case of Simit P Sheth, 2013 (356ITR451) had an occasion to deliver its judgment by confirming the decision of the ITAT which has estimated the disallowance at 12.5% of the disputed bogus purchases to meet the ends of justice. The head-note of the decision is reproduced as under:-

> *"Section 145 of the Income-tax Act, 1961-Method of accounting-Estimation of Profits[Bogus purchases]-Assessment Year 2006-07. Assessee was engaged in business of trading in steel on wholesale basis-Assessing Officer having found that some of alleged suppliers of steel to assessee had not supplied steel to assesee but had only provided sale bills, held that purchases made from said parties were bogus-He, accordingly, added entire amount of purchases to gross profit of assessee-Commissioner (Appeals) having found that assessee had indeed made purchases, though not from named parties but other parties from*

> *grey market, sustained addition to extent of 30 per cent of purchase cost as probable profit of assessee-Tribunal however, sustained addition to extent of 12.5%-Whether since purchases were not bogus but were made from parties other than those mentioned in books of accounts, only profit element embedded in such purchases could be added to assessee's income-Held, yes-Whether hence, order of Tribunal needed no interference-Held, yes [Paras 6,7 & 9] [In favour of assessee]". (emphasis supplied).*

5.2.1 With regard to the information received from DIT(Inv.), Mumbai the summary of the communication was already passed on to the appellant while communicating reasons for reopening. The AO could not have also passed on a copy of such statement since it is a comprehensive statement detailing the names of several bogus concerns flated by them and the modus operandi of their activities, including that of the concerns in whose names accommodation bills were given to the appellant company. Even though Bhanwarlal Jain group has not mentioned the names of the appellant in their statements, they have given the names of various concerns in whose names the invoices were given as mentioned elsewhere in this order and those names are appearing in the books of the appellant. Therefore, the link between the bogus concerns flated by the appellant in the names of the said bogus concerns, is established. Even though the AO could not prove substantively that the amounts given to the sellers in cheque form have come back to the appellant, the activities of accommodation entries in the trading community is not unheard of . Further, the disturbing facts revealed by Bhanwarlal Jain group during the course of search and seizure proceedings conducted by the investigation wing of the income tax department itself, cannot be lost sight of. Furthermore, one should not be carried away by the myth that any amount rooting through bank channels would establish the genuineness of the transactions as held by the Honorable Bombay High Court in the case of Naresh K Pahuja (2015) 54 taxmann.com 258. Even though there are catena of cases, including some of them delivered by the jurisdictional ITAT, which have decided the issue in favour of the assessee, they are not uniform in all the cases as they were decided as per the facts and circumstances of that particular case before them. I am of the opinion that the theory laid down by the Hon'ble Gujarat High Court in the case of Simit P Seth (supra) should be applied in the instant case. However, the decision rendered by Gujarat High Court in the above case is on the basis of VAT benefit the appellant might have saved by taking accommodation entries since the goods dealt by them were excisable commodities, where the VAT rates are on a higher side. In the case of diamond business the VAT charges are only 1% and the customs duty is about 2%. Keeping in view the above tax rates the intention of the assesee to save from the transactions should be viewed only to the extent of saving from the above taxes by indulging in unethical practice of taking accommodation entries. It is also pertinent to mention here the relevance of the Board's Instruction No.02/2008 dated February22,2008 wherein it has laid down a guideline in the form of benign assessment procedure for assessee's engaged in diamond manufacturing and/or trading, wherein it has stated that

> *B. If an assessee has shown a sum equal to or higher than 6% of its total turnover from such business as his income under the head profits and gains of business or profession for a particular*

assessment year, the assessing officer shall except he's the trading results.
C…….

5.2.2 From the factual matrix, it is evident that such unethical practices of obtaining accommodation entries to avoid impact of levies are not uncommon in this line of business. Since the issue of accommodation entries is a reality, to arrest such rampant malpractices, a restraint is always inevitable. We can find such a restraint advised by the Hon'ble Gujarat High court in the case of Simit P Seth (supra) without which avoiding payment of levies will continue unabated. Keeping in view the above instruction of the Board on the one hand and the saving gained by the assessee by involving in accommodation entries to the extent of levies on the other, I find it appropriate to take 3% of the reported bogus purchases for adding u/s 69C instead of adding 12.5% as the rate of 12.5% suggested in the case of Simit P sheth was in the context of a different business. The AO is directed accordingly. In view of this the ground is partly allowed.

5. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that the Ld. AO has made additions towards alleged bogus purchases @ 12.50% of such purchases, on the ground that the assessee is one of the beneficiary of accommodation entries of bogus purchase bills issued by Bhanwarlal Jain Group through web of companies. According to the Ld. AO, although the assesee has filed certain basic evidences, including purchase bill and payment proof against said purchase through bank, but failed to file further evidence in the backdrop of clear finding by the investigation wing of department that those parties are involved in providing accommodation entries without actual delivery of goods. The Ld. AO had also taken support from the investigation conducted during the course of search proceedings and statements recorded from Bhanwarlal Jain and his associates, where they had admitted that they are involved in providing bogus bills. Therefore, he came to the conclusion that purchase from the said party is bogus in nature. It is

the contention of the assessee before the lower authorities that purchases from the above party is supported by necessary evidences. It has furnished all possible evidences, including books of accounts, stock details and bank statement to prove that payment against said purchases have been made through proper banking channels.

6 Having considered arguments of both the sides and also, material available on record, we find that both the sides have failed to prove the case in their favour with necessary evidences. Although, assessee has filed certain basic evidences, but failed to file further evidences to conclusively prove purchases to the satisfactions of the Ld.AO. At the same time, the Ld. AO had also failed to take the investigation to a logical conclusion by carrying out necessary enquires, but he solely relied upon information received from investigation wing, which was further supported by search conducted in case of Bhanwarlal Jain group cases. Under these circumstances, it is difficult for us to accept arguments of both the sides. Further, various High Courts and Tribunals had considered an identical issue in light of investigation carried out in case of Bhanwarlal Jain and held that in case of purchases claims to have been made from alleged hawala dealers, only profit element embedded in those purchases needs to be taxed, but not total purchase from those parties. The Hon'ble Gujarat High Court, in the case of CIT vs Simith P.Sheth 356 ITR 451 had considered a similar issue and held that at the time of estimation of profit from alleged bogus purchases no uniform yardsticks could be adopted, but it depends upon facts of each case. The ITAT, Mumbai, in number of cases had considered an identical issue and depending upon facts of each case, directed

the Ld.AO to estimate profit of 3% to 12.50% on total alleged bogus purchases. In this case, the assessee is into the business of diamond trading. The profit element in diamond trading is around 2 to 3% depending upon nature of trade. Even, the BEP had recommended profit percentage of 2% in case of trading and 3% for manufacturers. The ld. AO, considering the nature of business of the assessee had estimated 12.50% profit, whereas the Ld.CIT(A) has scaled down estimation of profit to 3% on total alleged bogus purchase. Although, both authorities have taken different rate of profit for estimation of income from alleged bogus purchase, but no one could support said rate of gross profit with necessary evidences or any comparable cases. On the other hand, the assessee had also failed to file any comparable cases to support its arguments for lessor gross profit rate. Therefore, considering facts and circumstances of this case and consistent with view taken by the Co-ordinate Bench in number of cases, we are of the considered opinion that the ld. CIT(A) has taken one of the possible method for estimation of profit to settle dispute between the parties and also considering nature of industry and BEP rate has scaled down profit estimated by the AO to 3% on alleged bogus purchases.

7. Facts remain unchanged. The assessee has failed to bring on record any evidences to prove that profit rate adopted by the CIT(A) is not correct. Although, the ld. AR for the assessee had cited decision of Hon, ble Gujrat HC in case of ACIT vs. Vardhman Exports in Tax Appeal No. 265 of 2008, order dated 1/8/2016, and argued that no addition could be made towards purchases u/s 69C, when source of purchase is explained. We find that the Hon'ble Gujarat HC after considering facts recorded by the Tribunal came to

the conclusion that when purchases are recorded in books, payment for said purchase is made through bank and also when the supplier had filed audited books of accounts where purchases are recorded in books, then no addition could be made towards bogus purchases u/s 69C of the Act. In this case, there is no such factual finding from lower authorities and also the assessee has failed to file necessary evidences and hence, we are of the considered view that case law relied upon by the assessee is not applicable to facts of this case.

8. In this view of the matter and consistent with view taken by the coordinate bench in number of cases, we are of the considered view that the ld. CIT(A) has rightly scaled down addition made by the AO from 12.50% to 3% profit on alleged bogus purchases. Hence, we are inclined to uphold order of the ld. CIT(A) and dismiss appeal filed by the assessee.

9. In the result, appeal filed by the assessee for AY 2009-10 is dismissed.

ITA.No. 6155/Mum/2016, ITA No 6156/Mum/2016, ITA No. 6157/Mum/2016 & ITA No. 6158/Mum/2016:

10. The facts and issues involved in these four appeals are identical to facts and issues, which we had already considered in ITA.No.6154/Mum/2016 for AY 2009-10. The reasons given by us in preceding paragraph shall mutatis mutandis apply to these appeals also. Therefore, for detailed reasons given by us in preceding

paragraphs in ITA.No. 6154/Mum/2016, we dismissed appeals filed by the assessee for Asst years 2010-11 to 2013-14.

11. As a result, all appeals filed by the assessee are dismissed.

Order pronounced in the open court on this 03 /10/2019

Sd/-	**Sd/-**
(RAM LAL NEGI)	**(G. MANJUNATHA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 03/10/2019
Thirumalesh Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai