

**IN THE INCOME TAX APPELLATE TRIBUNAL  
Hyderabad ' A ' SMC Bench, Hyderabad**

**Before Smt. P. Madhavi Devi, Judicial Member**

ITA Nos.1316 & 1317/Hyd/2019		
Assessment Years: 2008-09 & 2009-10		
M/s. H.S. Varma Gems and Jewells, Secunderabad PAN:AADFH2019K	Vs.	Income Tax Officer Ward 10(4) Hyderabad
(Appellant)		(Respondent)
Assessee by:	Sri K.C. Devdas	
Revenue by:	Sri Sunku Srinivas, DR	
Date of hearing:	04/11/2019	
Date of pronouncement:	22/01/2020	

**ORDER**

Both are assessee's appeals for the A.Ys 2008-09 & 2009-10 against the individual orders of the CIT (A)-6, Hyderabad, dated 5.6.2019 respectively.

2. Brief facts of the case are that the assessee firm is into business of purchase and sale of Diamonds, Precious and Semi-precious Stones, Studded Jewellery, Gold Jewellery and allied items. It filed its return of income for the A.Y 2008-09 on 30.07.2008 admitting income of Rs.13,830/- and for the A.Y 2009-10, the return of income was filed on 28.7.2009 admitting income of Rs.14,810/-. Both the returns were processed u/s 143(1) of the I.T. Act. Subsequently, the AO received information from the DGIT (Inv.) Mumbai that the assessee firm is one of the beneficiaries of the accommodation entries given by certain parties at Mumbai and Surat as was found during the course of

search and seizure operation in the group cases carried out in Surat based non-genuine diamond concerns on 03.10.2013 and that the group of cases covered are referred to as “Gautam Jain & Others” who were believed to be concerns actively involved in providing non-genuine purchase bills and also unsecured loan accommodation ‘entries’ to various interested parties. It was further informed that as a result of the search & seizure action, it was conclusively proved that these Diamond concerns are only paper based companies with no real business activities as the Directors/Proprietors of all these concerns admitted on oath that they are nothing but paper companies with no genuine business. It was also informed that on perusal of the compilations of the letters of beneficiaries, the DGIT (Inv.) Mumbai found the name of the concerns in the list of beneficiaries of the accommodation entries and forwarded the same for necessary action to the AO.

3. In view of this information from DGIT (Inv.), Mumbai, the AO verified the information provided to him and found that the assessee firm i.e. H.S. Varma Gems & Jewells had a transaction of Rs.14,06,860/- with bogus diamond concern “M/s Krishna Diam” in the financial year 2007-08 relevant A.Y 2008-09. The AO verified the assessment records and found that the assessee had not filed its return of income for the A.Y 2008-09 and therefore, to verify the genuineness of the transaction and assess/re-assess the correct income of the assessee, a notice u/s 148 was issued on 24.03.2015. In response to the same, the assessee filed the letter dated 17.04.2015 and submitted a copy of the return of income along with enclosures submitted on 30.07.2008 and also copy of the intimation u/s 143(1). On

verification of these details, AO found that the assessee had a transaction of Rs.14,06,840/- with M/s Krishna Diam for Rs.9,06,750/- on 24.12.2007 and Rs.5,00,110/- on 14.01.2008. Therefore, the assessee was required to produce the books of account and also the details of the purchases. The assessee filed letters dated 12.02.2016 & 04.03.2016 along with copies of the retail invoice No.155 dated 24.12.2007 for Rs.9,06,750/-, Retail Invoice No.163 dated 14.01.2008 for Rs.5,00,110/- with proof in support of payments through cheque, confirmation of the account for the financial year 2007-08 by M/s. Krishna Diam wherein the suppliers had confirmed the transactions entered into. The assessee firm also submitted copies of the VAT form along with the sale bills. It was also stated that from the stock of purchases made from Krishna Diam, the assessee has sold stocks worth Rs.8,19,035/- to M/s. Vittaldas & Co., on 18.01.2008 and enclosed a cheque received from M/s. Vithaldas & Co. for the said sum.

4. The AO, however, was not convinced with the said conformations and evidence filed by the assessee. He held that the parties searched i.e. Gautam Jain and others have said that they are not into the real business but have only issued accommodation entries. Therefore, he held that when the bogus company Krishna Diam is not left with any physical stock, it is not known as to how the sale had taken place and how it has sold diamonds for Rs.14,06,860/-. Therefore, he disbelieved the purchase bills issued by M/s. Krishna Diam and brought the entire sum of Rs.14,06,860/- to tax. Aggrieved, the assessee preferred an appeal before the CIT (A) for the A.Y 2008-09

challenging both the validity of the assessment u/s 148 of the Act and the addition made by the AO.

5. The CIT (A) held that the return of income filed by the assessee on 30.07.2008 was only accepted by issuance of intimation u/s 143(1) and therefore, it cannot be held that there has been any assessment of income and therefore, within 4 years thereafter, the receipt of information that the assessee is one of the beneficiaries of accommodation entries is a valid reason for reopening of the assessment by issuance of notice u/s 148 of the Act. He also observed that the AO has recorded the reasons for reopening before issuance of a notice u/s 148. Therefore, he upheld the validity of the reopening.

6. As regards the addition made on account of bogus purchases, the CIT (A) held that the assessee has not been able to prove with any evidence that the assessee's representative had travelled to Surat to take delivery of the goods or that the assessee had physical stock with it which has subsequently been sold. As regards payment through banking channels also, the CIT (A) held that it is of little value since in the accommodation entries, the payment was also made through banking channels.

7. As regards the assessee's request for an opportunity to cross examine of Mr. Gautam Jain and others, the CIT (A) held that the burden of proof lies on the person who made the claim and since the assessee failed to prove that the assessee has purchased the diamonds from M/s. Krishna Diam, there was no need to allow cross examination particularly when the firm

Krishna Diam has not been examined by the AO. Against these findings of the CIT (A), the assessee is in appeal before the Tribunal by raising the following grounds of appeal:

*“1. The order of the Learned Commissioner of Income Tax (Appeals)-6, Hyderabad (CIT (A)) in sustaining the order of the Learned Assessing Officer ('AO') is erroneous and unsustainable both on facts and in law*

*2. The CIT(A) failed to note that there was no tangible material brought on record by the Aa to believe that income has escaped assessment and the reason should not arise from another authority or department, thus being contrary to the provisions contained in Section 147,148,149,150,151 of the IT Act, 1961.*

*3. The CIT(A) failed to note that the assessment proceeding was conducted merely on the basis of the information received by the DGIT, Mumbai despite submitting all the necessary evidences and as such there was no independent application of mind to assess the genuineness of the purchases.*

*4. The CIT(A) failed to note that the entire purchase of Rs 14,06,860/- was genuine, duly recorded in the books of accounts and was corroborated with the necessary evidences being. purchase bills, sales bills, VAT returns, confirmation from the supplier of the transactions and bank statements Therefore, the entire order passed by the CIT(A) is erroneous and unsustainable on facts.*

*5. The CIT(A) erred in dismissing the ground wherein there was no opportunity provided to cross examine the persons were witnesses of the Department*

*6. Any other ground(s) that may be urged at the time of hearing”.*

8. The learned Counsel for the assessee reiterated the submissions made by the assessee before the authorities below and submitted that the assessment has been reopened by the AO merely on the basis of a third party information without making his own enquiries and therefore, initiation of re-assessment proceedings itself is bad in law. In support of this contention, he

placed reliance upon the unreported judgment of the Hon'ble Supreme Court Review Petition (C) Diary No.22394 of 2019 in Civil Appeal Nos.9604 & 9605 of 2018 dated 21<sup>st</sup> August, 2019. On merits also, the learned Counsel for the assessee submitted that the assessee has purchased the diamonds from M/s. Krishna Diam as is evident from copies of the invoice bills as well as sale bills and also proved that these diamonds have subsequently been sold to another party and the payment has been received by way of cheques. Therefore, according to him, the assessee has proved the transactions and when the assessee has asked for an opportunity to cross examine the party who has allegedly given a statement that he was giving only an accommodation entries, he ought to have been provided with the same and since no such opportunity was provided, the assessment is bad in law. Similar arguments have been made for the A.Y 2009-10 as well wherein the parties who has been allegedly sold diamonds to the assessee were M/s. Sun Diam and Kriya Impex Pvt. Ltd. In the case for the A.Y 2009-10, the assessee had also submitted the affidavit of Shri Rajendra Jain, Proprietor of M/s. Kriya Impex Pvt Ltd and Sun Diam refuting the evidence of the search and seizure party and also retracting the statement given during the course of search and seizure.

9. The learned DR, on the other hand, supported the orders of the authorities below and submitted that the parties searched in Mumbai and Surat have clearly stated that they are not into the real business of purchase and sale of diamonds but are only issuing accommodation entries and therefore, there could not have been any real transaction done by the assessee with

them and the transactions are only shown on paper and the payments through cheques are clearly accommodation entries without any substance. He, therefore, submitted that the order of the AO and the CIT (A) should be confirmed for both the A.Ys. Both the parties have relied upon several case law and have filed copies before the Tribunal. Both the parties also filed written submissions as well.

10. Having regard to the rival contentions and the material on record, I find that the result of the search at Mumbai & Surat was that the parties who have been searched had given statements on oath that they are into accommodation entry business and that they are not into real trading of diamonds. In such circumstances, the DGIT (Inv.) Mumbai has forwarded the report to the AO of the assessee since the name of the assessee appeared as one of the beneficiaries of the accommodation entries provided by such searched parties. The AO after receipt of the said report seems to have examined whether the assessee is being the beneficiary of such accommodation entries and since he did not find the return of income filed by the assessee in order to verify the same, a notice u/s 148 has been issued. Thereafter, the assessee has filed the copy of the return of income and request for copy of the reasons for reopening, which have been supplied to him and it is seen therefrom that the report of the DGIT (Inv.) Mumbai is the basis for issuance of notice u/s 148. As rightly observed by the CIT (A), there was no assessment u/s 143(3) and it was only an intimation u/s 143(1). As rightly held by the CIT (A), 143(1) information cannot be treated as an assessment as held by the Hon'ble Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd in Civil Appeal No. 2830 of 2007 dated 23.05.2007. Since no assessment was made, there

is no question of forming any opinion and on receipt of the information from DGIT (Inv.) Mumbai, the AO was within his powers to initiate re-assessment proceedings u/s 148 of the Act. Therefore, the grounds against the validity of the re-assessment proceedings are rejected. The assessee has placed reliance upon the unreported decision of the Hon'ble Supreme Court in the case of CIT vs. M/s. Odeon Builders Pvt. Ltd. I find that the said case is distinguishable from the facts to the case before the Tribunal. In the above case, the issue was of bogus purchase of raw material for construction business of the assessee and the assessee therein had proved that relevant material has been purchased and also transported to the assessee. It was on the basis of the factual information filed which had been verified by the CIT (A) and had allowed the assessee's appeal and the Hon'ble Supreme Court has also confirmed the same. In the case before us, except for submitting the invoices, the assessee has not been able to prove with any other evidence (such as transportation charges), the receipt of diamonds. However, one thing that is common in both the cases is that though the assessee has asked for an opportunity to cross examine the suppliers, the assessee was not provided with such an opportunity. The CIT (A) has observed that the relevant party has not been examined by the AO and therefore, there is no question of providing an opportunity to cross examine. This finding of the CIT (A) cannot be sustained. The Revenue has recorded the statement of the Proprietors of M/s. Krishna Diam, M/s. Sun Diam and M/s. Kriya Impex during the course of search and survey and on the basis of such statements only, the assessments of the assessee for both the years have been reopened. The said statement is also the basis for not believing the evidence filed by the assessee and making additions to the returned incomes for both the AYs. Therefore, there is clearly a statement on the basis of which the additions have

been made in the hands of the assessee. It is settled position of the principles of natural justice that the assessee should not be deprived of an opportunity to cross examine a person whose statement is being relied upon to make the addition in the hands of the assessee. When the assessee has subsequently requested the AO to provide an opportunity to cross examine the person, whose statement is being relied upon, he ought to have been provided the same or at least he could have been provided with the statement of the said person to enable the assessee to rebut such statement with necessary evidence.

11. In view of the same, I deem it fit and proper to remand the issue to the file of the AO with a direction to provide a copy of the statement (wherein the assessee's name is mentioned as beneficiary) to the assessee and provide it with an opportunity to cross examine such person, if necessary.

12. In the case for the AY 2009-10, the assessee had also filed a copy of the affidavit of Mr. Rajender Jain retracting the statement made by him during the course of search. In such a situation, it is even more important that the assessee should be given an opportunity to cross examine the party particularly when he has confirmed the transaction made by the assessee. Another factor which could go in favour of the assessee is that the assessee has also shown the sale of such diamonds subsequently to one of the parties in Hyderabad who have been confirmed the transaction and the assessee has also received the consideration through banking channels. There cannot be any sale of stock if there were no purchases. Therefore, this factor also needs to be considered. In view of the same, the assessments for both the years are set aside and are remanded to the file of the AO for reconsideration and

for re-adjudication as directed above. I also make it clear that if the AO is not able to provide a copy of the statement to the assessee or provide an opportunity to cross examine the parties, then the additions cannot be sustained.

13. In the result, assessee's appeals are treated as allowed for statistical purposes.

Order pronounced in the Open Court on 22<sup>nd</sup> January, 2020.

**Sd/-**

**(P. MADHAVI DEVI)  
JUDICIAL MEMBER**

Hyderabad, dated 22<sup>nd</sup> January, 2020.

***Vinodan/sps***

Copy to:

- 1 M/s. HS Varma Gems & Jewells C/o M/s. Sekhar & Co. 133/4,  
Rashtrapathi Road, Secunderabad
- 2 ITO Ward 10(4) Hyderabad
- 3 CIT (A)-6 Hyderabad
- 4 Pr. CIT – 6, Hyderabad
- 5 The DR, ITAT Hyderabad
- 6 Guard File

*By Order*