

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

**BEFORE SHRI PAWAN SINGH, JM &
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 6478/Mum/2018
(निर्धारणवर्ष / Assessment Year: 2012-13)

ACIT- 22(3), Room No. 305, 3 rd floor, Piramal Chambers, Lalbaug, Parel, Mumbai-400 012	बनाम/ Vs.	Sujal H. Shah (HUF), 7A, Takshashila Apartment, Tagore Road, Santacruz (west), Mumbai-400 054
स्थायीलेखासं./जीआइआरसं./PAN No. AAIHS7833M		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri V. Vinod Kumar, DR
प्रत्यर्थीकीओरसे/ Respondent by	:	None
सुनवाईकीतारीख/ Date of Hearing	:	22.01.2020
घोषणाकीतारीख / Date of Pronouncement	:	05.02.2020

आदेश / ORDER

Per S. Rifaur Rahman, Accountant Member:

The present Appeal has been filed by the revenue against the order of Ld. Commissioner of Income Tax (Appeals) – 34 in short referred as ‘Ld. CIT(A)’, Mumbai, dated 28.08.18 for Assessment Year (in short AY) 2012-13.

2. At the outset, it is noticed that none appeared on behalf of assessee in spite of calls and even no application for adjournment was moved. On the other hand, Ld. DR is present in the court and is ready with arguments. Therefore, we have decided to proceed with the hearing of the case ex-parte with the assistance of the Ld. DR and the material placed on record.

3. The brief facts of the case are that assessee electronically filed its return of income on 24.09.2012 declaring total income at Rs.84,40,950/-. The assessee is a trader in cut and polished diamonds. Subsequently, the case was reopened u/s 147 on the basis of information received from DGIT(Inv.), Mumbai, that assessee was engaged in the practice of inflating the purchases by taking bogus bills from hawala parties without delivery of goods. It was also informed by the office of DGIT(Inv.), Mumbai that these sellers were examined by the Sales Tax Department and that they had admitted that they did not make any sale or purchase and that they were only engaged in raising false bills. With the above reasons, AO believed that income of the assessee is escaped and accordingly, notice u/s 148 was issued and served on the assessee. In continuance of the above proceedings, notices

u/s 143(2) and 142(1) of the Act were issued and served on the assessee. Based on the information requested by the assessee, the reason for reopening were issued to the assessee and assessee raised objections for reopening and the same was disposed off by the AO on 11.09.19. Further, in response to the show cause notice, assessee filed a letter dated 21.12.17, which is reproduced below:-

- 1. "We had purchased the Cut & polished diamond from M/s Marc Gems on 18.02.2012. Same is been evident by the Purchase invoice, correspondence sales invoice, stock register and Bank statement showing payment made. All these documents are already been submitted during the assessment procedure.*
- 2. We have not paid or receive any cash against the said purchase transaction and you have not provided any corroborative evidence to prove that we have paid / received any cash against such purchase transaction.*
- 3. Further M/s Marc Gems (Prop. Lavapal R Singh) is assessed to Income Tax vide PAN CVEPS0399P and also regular in filling the return of income.*
- 4. The relevant Purchase Transaction is reflected in the books of M/s Marc Gems as well our books and*

books of accounts of both the concerns are audited without any qualifications by auditors.

5. The purchase from M/s Marc Gems is in normal course of business which can be proved by stock summary provided to your good self.

6. We did not enter transaction of whatsoever nature with the said Shri. Bhanwarlal Jain as alleged by you.

7. We do not have any business connection with Mr. Bhanwarlal Jain and not entered in any kind of transaction with him or his group known to us.

8. Further we would like to bring to your notice that we have paid the purchase proceeds to M/s Marc Gems through proper banking channel only. Therefore, your allegation that the Purchase transaction is accommodation entry is baseless.

9. Further Bhanwalal Jain is not proprietor/ partner of M/s marc Gems. As far as we aware we do not have relation or contact of whatsoever nature with the said Bhanwarlal Jain. And therefore Mr Bhanwarlal Jain is third party for us. Further it is held in various judgements that reopening on the basis of statement of third party has no evidentiary value unless having corroborative evidence. Reliance is places in the following cases :- a.) [2007] 17 SOT 5 (CHENNAI)

(URO) ITAT CHENNAI BENCH 'B' MM. FINANCIERS (P.) LTD. v/s DEPUTY COMMISSIONER OF INCOME-TAX the hon. ITAT held that "In our opinion, there is no valid seized material representing addition of Rs. 1.49 lakhs towards undisclosed purchase consideration. It is only on surmise basis and statement recorded from third party, K. Madhava Reddy, and M/s. Shilpa Homes (P) Ltd. This cannot be acted upon. The Circular No. 286/2/2003/IT(Inv.), dated 10-03-2003 clearly refrains the Assessing Officer from recording confessional statement during the course of search and seizure and survey operations and also warns the Assessing Officer not to attempt to obtain any confessional statement as to the undisclosed income, and any action contrary shall be viewed adversely. It also states that the Assessing Officer should rely upon the evidence and material gathered during the course of search. Here in the present case, the evidence is only agreement which reflects the purchase consideration of 22 acres at Rs. 3,62,18,000/. The third party statement and unsigned agreement cannot be acted upon", b) CIT-22(1) v/s G V Sons, ITA No.2239/Mum/2012, it is held that "Simply on the basis of statement given by the third party, that they were also providing accommodation entries as well, the

conduct of the assessee cannot be doubted and held to be sham.

10. We request you to provide the material in support of your claim that we have entered non genuine purchase transaction with M/s Marc Gems.

11. The notice issued by you u/s 133(6) of the act is property served to M/s Marc Gems and in response to the same party already sent their reply via registered post on 20.12.2017 (copy of receipt attached herewith) and same will reach to you within 2-3 days. Further for a time being to prove the genuineness of the transaction, we requested the party to send us the relevant document through e-mail. We submitting followed documents which were sent by party through e-mail.

a. The copies of return filed acknowledgement, b. Our ledger account in the books of M/s Marc Gems c. Bank statement showing payment received by them d. Audited Profit & Loss A/c & Balance Sheet with its schedules (Reflecting our name)

It is not possible for the party to personally visit your office as they are located in Gujarat and it would not be convenient for them. However, with above submission we have proved the identity of party,

creditworthiness of the party and also proved the genuineness of purchase hence treating the same as bogus merely in the basis of forwarded information is incorrect".

4. After making detail verification, AO disallowed the purchases made from the alleged parties to the extent of Rs. 1,25,97,090/-.

5. Aggrieved with the above order, assessee preferred appeal before Ld. CIT(A) and assessee made a detail submission. Ld. CIT(A) after considering the submission of assessee, observed that AO has scrutinized the purchase invoices as well as sales invoices and AO noted that the purchase invoices were very silent on the type of item, only polished and cut diamond was mentioned against the description. Therefore, purchase invoices are not shown anything about the cut, colour, clarity, shape of diamond. In this type of business, the 4 c's are relevant i.e. cut, colour, clarity and carat weight are relevant. Ld. CIT(A) agreed that the sellers are not aware of the technical evaluation of the diamond quality and he agreed that the purchases made by the assessee cannot be treated as genuine. However, he observed that

AO did not doubt the sale component and accepted the sale declared by the assessee. In order to make the sales, assessee must have purchased from other parties and completed the transactions. In this respect, Ld. CIT(A) relied upon following case law:-

- i) Bholanath Poly Fab Pvt. Ltd. 355 ITR (Guj)**
- ii) ITO vrs. M/s Shah Diam (ITA No. 4013/Mum/2017)**
- iii) M/s Naitik Gems Vrs. ITO (ITA No. 4760/Mum/2017)**

6. Finally, Ld. CIT(A) observed that all the above decision of the Hon'ble High Court and Jurisdictional ITAT have held that in the identical issues and observed that VAT in the diamond industries at either 1% or totally exempt. Under the identical situation, Ld. CIT(A) observed that VAT charges are 1% and custom duty on import is about 2%. Keeping in view of the above percentages, he opined that assessee must have made benefit by indulging in unethical practice of taking accommodation. In views of the decisions of ITAT and Ld. CIT(A) came to the conclusion to disallow 3% of the purchases

reasonable. Accordingly, Ld. CIT(A) partly allowed the appeal of the assessee.

7. Aggrieved with the above order, revenue has preferred the appeal before us on the ground mentioned herein below:-

1) *"Whether on the facts and in the circumstances of the case and in law, the id. CIT(A) is correct in restricting the disallowance @ 3% of bogus purchases against 100% made by AO ignoring the latest decision of the Supreme Court in the case of M/s. N K Proteins Ltd. Vs. CIT No. 769 of 2017 dated 06.01.2017 (SC) wherein the Hon'ble Supreme Court has decided "the issue of bogus purchases with a direction of making addition amounting to entire bogus purchase as assessee's income."*

2) *"Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) failed to appreciate the fact that onus is on the assesses to explain and substantiate the genuineness and true nature of purchases transactions"*

3) *The appellant prays that the order of the CIT(A) on the above grounds be reversed and that of the A.O. be restored.*

4) *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

8. Considered the submission of Ld. DR and material placed on record. After considering the decision relied by Ld. CIT(A) and also considering the salient feature of the diamond industry, we are in agreement with Ld. CIT(A) that the margin derived by the diamond manufacturers are between 1.5% to 4.5% and in trading profits are in the range 1 to 3%. When the AO has not doubted the sales declared by the assessee and merely rejecting the purchases is not proper. Assessee must have taken advantage by taking accommodation entries. Therefore, we are inclined to accept the finding of Ld. CIT(A). Accordingly, grounds raised by the revenue are **dismissed**.

9. In the net result, the appeal filed by the revenue stands **dismissed**.

Order pronounced in the open court on 5th Feb, 2020.

Sd/-
(Pawan Singh)
न्यायिकसदस्य / Judicial Member
मुंबई Mumbai; दिनांक Dated :
Sr.PS. Dhananjay

Sd/-
(S. Rifaur Rahman)
लेखासदस्य / Accountant Member
05.02.2020

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File
आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai