

## आयकर अपीलीय अधिकरण "D" न्यायपीठ मुंबई

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

श्री विकास अवस्थी, न्यायिक सदस्य एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND  
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 2340/Mum/2018

(निर्धारण वर्ष / Assessment Year 2011-12)

आयकर अपील सं./ ITA No. 2341/Mum/2018

(निर्धारण वर्ष / Assessment Year 2012-13)

आयकर अपील सं./ ITA No. 2342/Mum/2018

(निर्धारण वर्ष / Assessment Year 2013-14)

Ramila Diam Pvt. Ltd. B-401, 4 <sup>th</sup> Floor, Anand Building, Tirupati Apartments, Bhulabhai Desai Road, Mumbai-400 026	बनाम/ Vs.	The Pr. Commissioner of Income Tax-5, Aayakar Bhavan, Maharshi Karve Road, Mumbai-400 020
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AAECR8201P		

अपीलार्थी की ओर से/ Appellant by	:	Shri M Subramanian, AR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri K. Madhusudan, DR

सुनवाई की तारीख / Date of hearing:	21.10.2020
घोषणा की तारीख / Date of pronouncement:	24.11.2020

### **आदेश / O R D E R**

श्री विकास अवस्थी, न्यायिक सदस्य के द्वारा

**PER VIKAS AWASTHY, JM:**

This appeals by the assessee are directed against the order of Principal Commissioner of Income Tax (in short 'the PCIT') passed



under section 263 Income-tax Act, 1961 (hereinafter referred to as 'the Act') for the AYs 2011-12, 2012-13 and 2013-14, respectively. All the impugned orders are of even date i.e. 23<sup>rd</sup> March 2018. The grounds of appeal in all the three Assessment Years are identical and the issue raised in the appeals, emanate from same set of facts. Therefore, these appeals are taken up together for adjudication and are decided by this common order.

For the sake of convenience, the facts are narrated from the appeal in ITA No. 2340/Mum/2018 for the assessment year 2011-12.

2. Shri M Subramanian, appearing on behalf of the assessee narrating the facts of case submitted that the assessee is a dealer in diamonds. The assessee is also engaged in import and export of diamonds. On the basis of search conducted on Bhanwarlal Jain group on 03.10.2013, the assessment for Assessment Year 2011-12 was reopened. It was alleged that the assessee has engaged in obtaining accommodation entries to the tune of ₹18,08,24,885/- for the period relevant to the Assessment Year 2011-12. The Assessing Officer estimated the Gross Profit (GP) at the rate of 12.5% on the alleged bogus purchases/ accommodation entries from Bhanwarlal Jain. However, the Assessing Officer reduced the Gross Profit (4%) already declared by the assessee and made addition of difference i.e. 8.5% on the alleged accommodation entries. Thus, the Assessing Officer made addition of ₹1,53,70,115/- on account of suppression of GP on accommodation entries.



Aggrieved, by the assessment order dated 29.03.2016 passed under section 143(3) read with section 147 of the Act, the assessee filed appeal before the CIT(A). In the meantime, the Principal Commissioner of Income Tax (PCIT) invoked revisional jurisdiction and issued notice dated 01.03.2018 under section 263 of the Act. The PCIT vide impugned order held the assessment order passed under section 143(3) read with section 147 as erroneous and prejudicial to the interest of Revenue as the AO has erred in estimating GP on bogus entries. According to PCIT the entire amount of alleged accommodation entries should have been brought to tax. The PCIT set aside the assessment order and directed the Assessing Officer to carry out inquiries and make fresh assessment. Hence, the present appeal by the assessee.

2.1 The AR submitted that the assessment for Assessment Year 2011-12 was reopened on the basis of information received from investigation Wing regarding assessee's alleged involvement in obtaining accommodation entries from Bhanwarlal Jain group. It was alleged that the assessee had obtained accommodation entries to the tune of ₹18,08,24,885/-. The learned AR referred to the reasons recorded for reopening of assessment under section 147 at page 41 and 42 of the paper book. The learned AR submitted that once the assessment has been reopened and the investigation has been conducted by the Assessing Officer and on the basis of such investigation Assessing Officer framed the assessment order, the PCIT



cannot invoke jurisdiction under section 263 of the Act on the' ground that proper enquiries were not made by the Assessing Officer. Merely for the reason that the PCIT does not agree with the findings of Assessing Officer, the PCIT cannot invoke revisional jurisdiction. The learned AR in support of his contention placed reliance on the following decisions: -

Malabar Industrial Co. Ltd. Vs. CIT [2000] 243 ITR 83 (SC)

CIT Vs. Max India Ltd. [2007] 295 ITR 282 (SC)

CIT vs. Gabriel India Ltd. [1993] 203 ITR 108 (Bombay)

2.2 The learned AR on merits of the addition submitted that the Assessing Officer has made addition by estimating gross profit on alleged bogus entries. Although estimation of GP by Assessing Officer is on the higher side i.e. as against the GP of 4% declared by the assessee, the Assessing Officer has estimated GP at the rate of 12.5%. The PCIT in exercise of revisional jurisdiction is seeking addition of entire alleged accommodation entries. The learned AR submitted that the Hon'ble Bombay High Court in the case of PCIT vs. Mohommad Haji Adam & Co. decided on 11.02.2019 has held that where the sales are not disputed by the Revenue, it is only profit element embedded in the bogus purchases that has to be brought to tax. Similar view has been taken by Hon'ble Jurisdictional High Court in the case of PCIT vs. Paramshakti Distributors Pvt. Ltd. decided on 15.07.2019. The



Assessing Officer estimated GP on alleged bogus entries in line with the decisions of Hon'ble High Court.

2.3 The learned AR further submitted that the PCIT has invoked revisional powers despite the fact that the assessee had already filed appeal against the estimation of GP at higher side by the Assessing Officer. Once, the assessment order is under appeal on an issue, it is not open to PCIT under section 263 of the Act to invoke revisional jurisdiction on the same issue. The Ld. AR referred to Explanation 1 (3) to Sec 263 (1) to support his arguments. The learned AR prayed for quashing the impugned order.

3. On the other hand, Shri K. Madhusudan representing the department vehemently defended the impugned order. The learned Departmental Representative submitted that the Assessing Officer while passing assessment order has not conducted investigations. The Assessing Officer merely presumed that the assessee has made purchases from grey market and has disclosed entire sales in the books. The findings of the Assessing Officer are based on assumptions and presumptions that have been rightly rejected by the PCIT.

4. We have heard the submissions made by the rival sides and have examined the orders of the authorities below. We have also considered the decisions on which reliance has been placed by Id. AR. The assessment in the case of assessee for Assessment Year 2011-12 was reopened on the basis of information received by Investigation Wing



after search on Bhanwarlal Jain group. As per the information, the assessee has obtained accommodation entries from the said group. A perusal of the assessment order passed under section 147 of the Act, reveal that the Assessing Officer after examining the documents on record came to the conclusion that the assessee has obtained accommodation entries. Since, the sales declared by the assessee were accepted by the Department, the Assessing Officer estimated GP at the rate of 12.5% on the said accommodation entries to bring to tax profit embedded in such bogus transactions.

5. The PCIT invoked revisional jurisdiction under section 263 of the Act as he did not concur with the view of Assessing Officer in estimating GP on alleged accommodation entries. The PCIT further rejected the view of Assessing Officer in assuming that the assessee had made purchases from grey market.

6. The provisions of section 263 of the Act can be invoked if, twin conditions mandated under the section are satisfied, i.e:

- (i) the order of the Assessing Officer sought to be revised is erroneous; and
- (ii) it is prejudicial to the interests of the revenue.

It is only with these two conditions are satisfied, the provisions of section 263 of the Act can be invoked. Merely, for the reason that PCIT does not concur with the view of Assessing Officer, does not give



powers to the PCIT to invoke revisional jurisdiction. In the instant case, we find that the Assessing Officer in reassessment proceedings made investigations and came to the conclusion that the assessee has not been able to link all purchases made from concerns belonging to Bhanwarlal Jain group to its sales. The Assessing Officer has highlighted this fact with the help of table in Para 5 at page 8 & 9 of the assessment order. Since, the sales made by the assessee were not disputed by the Department the entire alleged bogus purchases could not have been added. The logical assumption to match the sales is that the assessee must have made purchases from grey market and obtained corresponding bogus bills from entry providers. Ergo, it is only the profit element embedded in the bogus bills that has to be taxed. Thus, the Assessing Officer on the basis of the documents on record estimated GP at 12.5%.

7. The Hon'ble Jurisdictional High court in the case of Mohommad Haji Adam & Co. (supra) and Paramshakti Distributors Pvt. Ltd. (supra) has held that in case of bogus purchases, purchases cannot be rejected without distrusting the sales in case of a trader. The addition can be restricted to the extent of GP rate on such purchases to bring it at par with genuine purchases. In other words, it is only the profit element embedded in the bogus purchase bills that is to be brought to tax and the entire bogus purchases cannot be added. The Assessing Officer was right in taxing only profit by estimating GP on alleged bogus purchases.



8. As regards invoking of jurisdiction under section 263 of the Act by PCIT, we are of considered view that the PCIT has over stepped while exercising his revisional powers. The Assessing Officer has passed the order by estimating GP after examining the documents on record and considering various judicial pronouncements. The Assessing Officer has taken one of the possible views by making reasonable assumption that the assessee might have procured the goods from grey market. This assumption has been accepted by the Tribunal in various decisions where the revenue has accepted the sales/ turnover corresponding to alleged bogus purchases. The Hon'ble Supreme Court of India in the case of Malabar Industrial Co. Ltd. v. Commissioner of Income-tax (supra) in an unambiguous manner has held that where two views are possible and the Assessing Officer has taken one of the possible views to which CIT does not agree, this would not make the assessment order erroneous. The relevant extract of the judgement by the Hon'ble Apex Court is as under:

*"9. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it*



*cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law.”*

Similar view has been expressed by the Hon'ble Supreme Court of India in the case of Commissioner of Income-tax (Central) v. Max India Ltd (supra). In the instant case the assessment order may be prejudicial to the interest of revenue but it cannot be said to be erroneous. Since, both the conditions to trigger Sec 263 are not satisfied, the PCIT has erred in invoking his revisional power.

9. Thus, in the light of facts discussed above and the judicial pronouncements referred, the impugned order is quashed and the appeal of assessee is allowed.

### **ITA No. 2341/Mum/2018 - Assessment Year 2012-13**

10. The learned AR submitted that the facts in Assessment Year 2012-13 are identical to the facts for Assessment Year 2011-12. Assessment was reopened for similar reasons and thereafter PCIT invoked the revisional jurisdiction under section 263 of the Act for identical reasons.

The learned Departmental Representative concurred with the statement made by the learned AR for the assessee.

11. Since, the facts germane to the appeal for Assessment Years 2011-12 and 2012-13 are peri-materia, the findings given by us while



adjudicating the appeal for Assessment Year 2011-12 would mutatis mutandis apply to the present appeal, as well. Accordingly, the impugned order is quashed for similar reasons and the appeal of assessee is allowed.

### **ITA No. 2342/Mum/2018 - Assessment Year 2013-14**

12. The learned AR submitted that the only difference in the present appeal is that the assessment order is passed under section 143(3) of the Act. However, the reasons and manner for estimating GP on alleged accommodation entries from Bhanwarlal Jain Group concerns by the Assessing Officer are identical to the previous two years. Therefore, submissions made for previous two appeals will equally cover the present appeal. The PCIT has invoked revisional powers for identical reasons.

13. The facts in the impugned assessment year are similar to the facts in earlier assessment years except that the assessment order has been passed under section 143(3) of the Act. We find that the Assessing Officer in assessment proceedings has made similar observations as were made in proceeding under section 147 read with section 143(3) for Assessment Year 2011-12 and 2012-13 for making addition in respect of bogus purchases. Since, there is no material difference in the manner and nature of addition in dispute, the findings given by us while deciding the appeal of assessee for Assessment Year 2011-12 would mutatis mutandis apply to the present appeal.



Accordingly, the impugned order is quashed and the appeal of assessee is allowed.

**14. In the Result, all three appeals by the of assessee are allowed.**

Order pronounced in the open court on Tuesday the 24<sup>th</sup> day of November, 2020.

(राजेश कुमार / RAJESH KUMAR)

(विकास अवस्थी / VIKAS AWASTHY)

(लेखा सदस्य / ACCOUNTANT MEMBER)

(न्यायिक सदस्य / JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 24.11.2020

सुदीप सरकार, व. निजी सचिव/ Sudip Sarkar, Sr.PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai