

आयकर अपीलीय अधिकरण “ए” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

1. आयकरअपील सं./ I.T.A. No.2099/Mum/2019
(निर्धारण वर्ष / Assessment Year: 2012-13)

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2. आयकरअपील सं./ I.T.A. No.2100/Mum/2019
(निर्धारण वर्ष / Assessment Year: 2013-14)

DCIT-CC-3(1) Room No.1924, 19 th Floor Air India Building, Nariman Point Mumbai-400 021.	बनाम / Vs.	M/s. Lucent Diamond Flat No.8, Usha Kiran CHS ML Dhanukar Marg Mumbai-400 026.
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AAAFI-0122-A		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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3. आयकरअपील सं./ I.T.A. No.1833/Mum/2019
(निर्धारण वर्ष / Assessment Year: 2015-16)

&

4. C.O. No.09/Mum/2021
(Arising from I.T.A. No.2099/Mum/2019)
(निर्धारण वर्ष / Assessment Year: 2012-13)

&

5. C.O. No.08/Mum/2021
(Arising from I.T.A. No.2100/Mum/2019)
(निर्धारण वर्ष / Assessment Year: 2013-14)

M/s. Lucent Diamond Flat No.8, Usha Kiran CHS ML Dhanukar Marg Mumbai-400 026.	बनाम/ Vs.	DCIT-CC-3(1) Room No.1924, 19 th Floor Air India Building, Nariman Point Mumbai-400 021.
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AAAFI-0122-A		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri N.R. Agrawal-Ld.AR
Revenue by	:	Dr. Rajeev Harit -Ld. CIT-DR

सुनवाई की तारीख/ Date of Hearing	:	23/02/2021
घोषणा की तारीख / Date of Pronouncement	:	03.05.2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1.1 The revenue is in appeal for Assessment Years (AY) 2012-13 & 2013-14 whereas the assessee is in further appeal for AY 2015-16. The assessee has also filed cross-objections for AYs 2012-13 & 2013-14. The facts, as well as issues are, more or less, identical in all the years and therefore, the appeals as well as cross-objections were heard together and are now being disposed-off by way of this common order for the sake of convenience & brevity.

1.2 The registry has noted a delay of 53 days in assessee's cross-objections, the condonation of which has been sought by assessee's Chartered Accountant on the strength of condonation petition dated 19/01/2021. It has been submitted that delay occurred since due to Covid-19 pandemic, the office was not functioning fully as the employees who were travelling by trains could not reach office from suburbs since travelling in local trains was not allowed. Therefore, there was no co-ordination which resulted in delay in filing the cross-objections. Though Ld. CIT-DR opposed condonation of delay, however, we find that there was reasonable cause for delayed filing of cross-objections and hence, we are inclined to condone the delay in the interest of justice.

1.3 Proceeding further, learned counsel for Assessee (AR), at the outset, submitted that issues of appeals / cross-objections i.e. addition on account of alleged bogus purchases as well as disallowance of labor

charges are covered by the order of Tribunal in assessee's group / associated concern namely M/s Sur Gems. The copy of Tribunal order in ITA Nos. 2078/Mum/2019 & ors. dated 28/12/2020 has been placed on record. The Ld. AR pleaded to make estimation on similar lines. The Ld. CIT-DR, on the other hand, pleaded for restoration of assessment framed by Ld. Assessing Officer (AO).

2. We have carefully heard the rival submissions, gone through written submissions filed before us and perused relevant material on record including the cited order of the Tribunal in assessee's group concern. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

3.1 The material facts in AY 2012-13 are that the assessee being resident firm was subjected to an assessment u/s 143(3) r.w.s. 153A of the Act on 29/12/2017 in view of the fact that M/s Sur Gems group was searched u/s 132 on 18/11/2015. The assessee being part of the group was also covered under the search and seizure action. Accordingly, notice u/s 153A was issued to the assessee on 21/02/2017 which was followed by other statutory notices wherein requisite details / explanations were called from the assessee. The assessee group was stated to be engaged in import and exports of diamonds.

3.2 The statement of key person of assessee group i.e. Shri Saket Sudhir Mehta was recorded u/s 132(4) wherein he was directed to explain the modus operandi of purchases made by various group concerns since there were allegations that the assessee group indulged in accepting accommodation entries of bogus purchases. These purchases were stated to be made from alleged bogus concerns being run / operated by Shri Bhanwarlal Jain group who was also subjected to

search action u/s 132 on 03/10/2013. During search operation on that group, it transpired that the various concerns being run by that group merely indulged in providing accommodation entries without doing any actual business. Though the various statements made by Shri Bhanwarlal Jain group were confronted to Shri Saket Sudhir Mehta of assessee group, however, he denied that the purchases made by his concerns were accommodation entries. During assessment proceedings, in support of purchase transactions, copies of purchase invoices, quantitative details, bank statements evidencing payment through banking channels, confirmed ledger accounts with PAN, correlation of corresponding sales with purchases were furnished. The attention was drawn to the fact that the purchased goods have subsequently been sold and therefore, purchase could not be doubted. Reliance was placed on various judicial pronouncements to support the submissions.

3.3 However, the said submissions could not find favor with Ld. AO who ultimately disallowed the purchases of Rs.470.66 Lacs stated to be made from 4 concerns being controlled by Shri Bhanwarlal Jain group and added the same to the income of the assessee.

4.1 Before Ld. CIT(A), the assessee, inter-alia, submitted that import of rough diamonds as well as export of polished diamonds was certified by the custom authorities. Further, complete quantitative tally was provided in Tax Audit Report in Form No.3CD and there was correlation of purchases with corresponding sales and the profits arising there-from was already offered to tax. The attention was drawn to the documentary evidences submitted during the course of assessment proceeding to establish the genuineness of the purchases transactions. The assessee also pointed out that adverse statements made by tainted group could

not be used against the assessee unless an opportunity of cross-examination of persons making those statements was provided.

4.2 However, going by the findings of search team in the case of Shri Bhanwarlal Jain group that his concerns merely indulged in providing accommodation bills without doing any real business, Ld. CIT(A) opined that the assessee's claim could not be accepted in totality. Regarding cross-examination, it was noted that none of the suppliers was found at the given addresses and they did not respond to notices u/s 133(6). Even the assessee failed to produce any of the suppliers and therefore, the basic onus as casted upon assessee was not discharged.

4.3 In the above background, Ld. CIT(A) opined that profit element embedded in these transactions was to be brought to tax as held by Hon'ble Gujarat High Court in the case of **Smit P. Sheth (38 Taxmann.com 385)** and various other decisions as enumerated in the impugned order. Since the average Gross Profit earned by the assessee in past two non-tainted years worked out to be 13.36%, the rate against the tainted purchases was estimated at 15% which was to be reduced by profits already shown by assessee against these purchases in the books of accounts.

4.4 Aggrieved, the revenue is in further appeal before us whereas the assessee has raised cross-objections challenging the rate of 15% as adopted by Ld. CIT(A).

5. We find that assessee is part of M/s Sur Gems Group. The said group was subjected to search action in view of the allegations that the group obtained accommodation bills from various concerns run by Shri Bhanwalal Jain Group. During search operation on that group, it transpired that these concerns were merely issuing accommodation bills

without carrying out any real business. The same is further evidenced by the fact that notices u/s 133(6) did not elicit any response and none of the suppliers was found at the given addresses. The assessee also failed to produce any of the suppliers to confirm the transactions. Therefore, the basic onus to establish the genuineness of the purchase remained un-discharged. At the same time, the assessee was in possession of purchase invoices and the payment to the suppliers was through banking channels. The ledger confirmation as well as PAN of suppliers was placed on record. The import as well as exports was certified by the custom authorities. Further, complete quantitative tally of stock was provided along with correlation of purchases with corresponding sales. There could be no sale without actual purchase of material keeping in mind the fact that the assessee was engaged in trading activities. Therefore, the factual matrix, in our considered opinion, would make it a fit case for estimation of profit element embedded in these purchase transactions to plug the possible leakage of revenue. Therefore, the approach of Ld. CIT(A) in estimating the profit could not be faulted with.

So far as the estimation made by Ld. CIT(A) is concerned, we find that under similar facts and circumstances, the coordinate bench of this Tribunal, in the cited order of M/s Sur Gem (an associated concern of the assessee) has estimated profit rate of 6% of bogus purchases minus GP already declared by the assessee. The said estimation is in accordance with CBDT instruction no.2 of 2008 dated 22/08/2008 wherein the CBDT has directed all the AOs to accept profit of 6% in diamond business. The assessee, in the present case, has reflected GP rate in the range of 3% to 3.5% in AYS 2012-13 & 2013-14 as is evident from its financial

statements. Therefore, following the cited decision of Tribunal and for ease of computations, we direct Ld. AO to make addition of 3% (net) of tainted purchases without any further benefit. The same works out to be Rs.14,11,982/- (3% of Rs.4,70,66,091/-) for AY 2012-13 and Rs.4,81,103/- (3% of Rs.1,60,36,782/-) for AY 2013-14. The addition to that extent stand confirmed in both the years.

In the result, assessee's cross-objection stands partly allowed. The revenue's appeal for AY 2012-13 stands dismissed. This ground of revenue's appeal for AY 2013-14 stands dismissed.

6. The only surviving ground in revenue's appeal for AY 2013-14 is with respect to disallowance of labour charges. The relevant facts are that during search action, it was observed that huge labour charges were paid by assessee group to various concerns. Evidences in the form of rubber stamps of various concerns to whom labour charges were paid, were found. Accordingly statement of assessee's accountant as well as financial officer was recorded during the course of search operations and question relating to labour charges were put to both of them. The assessee's accountant made admission that invoices seized in respect of labour charges were prepared by her in respect of various entities on office computer. The question relating to seizure of rubber stamps could not be replied satisfactorily. The labour bills were stated to be prepared on the instructions of Shri Saket Sudhir Mehta since the labour parties were not qualified enough to do the paper work. Shri Saket Sudhir Mehta admitted that invoices were prepared on his instructions to make payment to the persons / entities in the form of labor charges. However, the allegation that these expenses were bogus, were denied in the statement.

The Ld. AO, going by the material as well as admission made during search operations, formed an opinion that the assessee group booked bogus labour expenditure. In assessee's case, it was found that the assessee paid labour charges of Rs.42,445/- to an entity namely M/s H.S. Enterprises during the year, whose rubber stamp was also found at assessee's premises during search.

During assessment proceedings, the assessee submitted that labour charges were incurred for cutting / polishing of rough diamonds to convert them into polished diamonds. Similar expenditure was being incurred for past several years. Further, due TDS was deducted against the payment and therefore, the payment were genuine and incurred wholly and exclusively for the purpose of business. However, rejecting the same, labour charges were disallowed and added back to assessee's income u/s 69C.

The Ld. CIT(A) noted that keeping in view assessee's nature of business, there was direct correlation of labour / job work charges since rough diamonds were imported and the same were exported after polishing. The same would require labour / job work. The charges for the year under consideration could be extrapolated on the basis of ratio of labour charges to value of imported diamond in the year of search i.e. AY 2016-17. Such ratio was 4.08% as against ratio of 1.41% for the year under consideration and therefore, the impugned disallowance was deleted. Aggrieved, the revenue is in further appeal before us.

7. Upon due consideration of factual matrix, it is evident that the assessee imported rough diamonds and exported polished diamonds during the year. The conversion of rough diamonds into polished diamond would certainly require certain labour / job work as rightly noted

by Ld. CIT(A). In whole of the year, the assessee has claimed labour charges of Rs.42,445/- only which has been fully disallowed. We further find that the payment to the labour contractor is through account payee cheques after deduction of tax at source. Therefore, the additions on mere suspicion, in our opinion, could not be sustained in the eyes of law. Therefore, the impugned order, though on different reasoning, would not require any interference on our part. The ground raised by the revenue stand dismissed. The revenue's appeal for AY 2013-14 stand dismissed.

8. In AY 2015-16, similar assessment has been framed against the assessee u/s 143(3) r.w.s 153A on 29/12/2017 wherein labour charges of Rs.29.65 Lacs as claimed by the assessee were disallowed. These charges were paid to three entities viz. Diantique, Kriya Gems & Khodabhai B. Ahir. The assessee raised similar defense as in AY 2013-14 but the same could not find favor with Ld. AO who ultimately disallowed these expenses.

The Ld. CIT(A), applying the same logic and reasoning, extrapolated the labour charges by applying the ratio of AY 2016-17 which resulted into confirmation of addition to the extent of Rs.12.95 Lacs. Aggrieved, the assessee is in further appeal before us.

9. We find that our adjudication as for AY 2013-14, on this issue, is equally applicable to this year also since the orders of lower authorities are on similar lines. The ratio of labour charges in various years could not be assumed to be constant in view of the fact that labour charges would be dependent upon various factors i.e. size, quantity, quality, shape & color of rough diamond. Since the assessee was manufacturing combination of all sizes as per the demand of the market, the percentage of labour charges would obviously be different in different years. Another

fact is that the payment to labour contractor is through account payee cheques after deduction of tax at source. The assessee has denied that the charges were bogus. There is no concrete material before Ld. AO to disallow the labour charges incurred by the assessee. No addition could be sustained merely on the basis of suspicion or doubt. Therefore the additions as sustained by Ld. CIT(A) could not be upheld. By deleting the same, we allow the appeal.

Conclusion

10. The revenue's appeals stand dismissed. The assessee's appeal stand allowed. The assessee's cross-objections stand partly allowed to the extent indicated in the order.

Order pronounced on 3rd May, 2021.

Sd/-

(Mahavir Singh)

उपाध्यक्ष / Vice President

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 03/05/2021
Sr.PS, Jaisy Varghese

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/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**