

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

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

ITA NO. 4486/MUM/2019 : **A.Y : 2007-08**

M/s. Sushila Diamonds Vs. Income Tax Officer – 19(3)(4),
CW-6080, Bharat Diamond Mumbai. (Respondent)
Bourse, 6th Floor, BKC, Bandra (E),
Mumbai 400 051.
PAN : AAKFS7138M (Appellant)

Appellant by : **None**
Respondent by : **Ms. Smita Verma**

Date of Hearing : **24/02/2021**
Date of Pronouncement : **18/05/2021**

ORDER

PER SHAMIM YAHYA, AM :

This appeal by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals) - 30, Mumbai (in short 'the CIT(A)') dated 12.02.2019 and pertains to Assessment Year 2007-08.

2. The grounds of appeal read as under :-

"1. The Learned Commissioner of Income Tax, has erred both in law and in facts by enhancing the adhoc addition @ 8% of the purchases made from Mihir Diamond Rs.41,56,885/-, Moulimani Impex Private Limited Rs.59,99,463/- and Sparsh Exports Private Ltd. Rs.25,37,500/- totalling in all to Rs.1,26,93,840/- to 100% of the said purchases which is purely unjustified and baseless and hence be deleted in totality.

2. *The Learned Commissioner of Income Tax did not provide any opportunity of being heard.”*

3. The brief facts of the case are that assessee is engaged in the business of trade and export of diamonds. Pursuant to departmental enquiry and survey action conducted in the case of Jain group, the Assessing Officer noted that assessee has indulged in bogus purchases from three parties. The total purchases from these parties amounted to Rs.1.26 crores. In the assessment order, the Assessing Officer noted that assessee has provided all the necessary details but for the delivery challans. The observation of the Assessing Officer in this regard is as under :-

“6. The assessee’s submission is considered but found not acceptable. It is seen from details filed on record that barring the stock register entry and cheques payments, custom appraisal report in respect to export sales no other document such as delivery challans, etc were produced during the course of assessment proceedings. This leads to prove that the purchases shown to have been made by the assessee from this firm is bogus. Since the assessee has provided stock statement and entries of the said purchases, the only inevitable conclusion to be drawn is that the assessee might have made these purchases from open markets either directly or through broker from some parties best known to him.”

4. Against the above order, assessee appealed before the Ld. CIT(A). The Ld. CIT(A) noted that it was never the assessee’s claim that assessee has made the purchases from grey market. Hence, she rejected the Assessing Officer’s estimate of 8% addition. She proceeded to make enhancement. She referred to Hon'ble Bombay High Court decision in the case of Shoreline Hotel. She proceeded to hold that the entire purchase of Rs.1.26 crore is enhanced. Against this order, assessee is in appeal before us.

5. We have heard the learned Departmental Representative. None appeared on behalf of the assessee. Upon careful consideration, we note that the Assessing Officer has noted that the assessee has submitted the purchase bills as well as the records of exports of the purchases. The opinion of the Assessing Officer is that purchases are from the grey market. Hence he made an estimated disallowance of 8%. It is settled law from Hon'ble Bombay High Court in the case of Nickunj Eximp Enterprises (in Writ Petition No. 2860, order dated 18.06.2014) that when sales are not doubted, 100% disallowance for purchases is not permissible.

6. The Ld. CIT(A) has passed an order without any application of mind. She notes that assessee has never made a claim that purchases are from the grey market. In this regard, we note that assessee's claim was that the entire purchase was genuine. Hence, how can the Ld. CIT(A) draw adverse inference on the Assessing Officer's assessment on this ground is not understood. Thereafter, she refers to the decision of Hon'ble Bombay High Court in the case of Shoreline Hotel. This was in connection with ITAT order upholding CIT(A) order under Section 263 of the Income Tax Act, 1961 (in short 'the Act') in case of purchases for hotel consumption. We fail to understand how this case is applicable in the facts of the present case.

7. Furthermore, we note that the Ld. CIT(A) had made the enhancement without giving notice to the assessee, which is in contradiction to Section 251(2) of the Act. Section 251(2) of the Act reads as under :-

"251(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a

reasonable opportunity of showing cause against such enhancement or reduction.”

Hence, the order of Ld. CIT(A) in contradiction to Section 251(2) of the Act is unsustainable in law. In this view of the matter, we have no hesitation whatsoever in setting aside the order of Ld. CIT(A). Hence, we reverse the order of Ld. CIT(A) and restore that of Assessing Officer.

8. In the result, appeal of the assessee is partly allowed.

Order pronounced under Rule 34(4) of ITAT Rules on 18th May, 2021.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai, Date : 18th May, 2021

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "SMC" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai