

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

**BEFORE SHRI KULDIP SINGH, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 487/MUM/2022 (A.Y. 2015-16)

M/s. A2 Jewels 204, Spna Apartment Jadda Khadi, Mahidharpura Surat, Gujarat - 395003 PAN: AAMFA7751J	v.	ACIT - Central Circle – 1(3) Pratishtha Bhavan Mumbai - 400020
(Appellant)		(Respondent)

Assessee Represented by	:	Ms. Vaishali More
Department Represented by	:	Shri Manoj Sinha
Date of Hearing	:	08.09.2022
Date of Pronouncement	:	10.11.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals)-47, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 21.01.2022 for the A.Y.2015-16.

2. Brief facts of the case are, assessee filed its return of income on 23.09.2015 declaring total income of ₹.63,950/- and the same was processed u/s. 143(1) of Income-tax Act, 1961 (in short "Act"). Subsequently Assessing Officer after recording reasons for reopening of assessment (as mentioned in the Assessment Order in Para No.2) reopened the assessment by issue of notice u/s. 148 of the Act dated 05.09.2018. Subsequently Assessing Officer issued notices u/s.143(2) and 142(1) of the Act to the assessee and the same were duly served on the assessee. In response to the notices, Assessee failed to submit any details as called for by the Assessing Officer.

3. During the assessment proceedings Assessing Officer observed that assessee is one of the entities controlled by Shri Bhanwarlal Jain. Shri Bhawarlal Jain and a number of his associates/relatives/employees were covered u/s 132(1) of the Act. In the said block assessment made u/s.153A r.w.s. 143(3) of the Act for A.Y. 2008-09 to A.Y. 2014-15, it has been noted and documented that the nature of the Assessee 'business involved is 'Trading in Diamond'. Notably it has been stated in the submission that the affairs of the assessee is managed by Shri Bhanwarlal Jain through its dummy directors/partners/proprietors. Almost all the activities during the previous year relevant to the block period are identical

to that of the Assessee's activities during the previous year under consideration.

4. Assessing Officer further observed that to recapitulate the facts revealed during the search and seizure action in the case of Shri Bhanwarlal Jain and his associates. It has been clearly revealed by the circumstantial evidences and other material facts, found and seized during the course of search that the Assessee is also an entity of the said group and has been de-facto controlled and managed by Shri Bhanwarlal Jain. The circumstances and factual outcome during the instant proceedings give a clear indication that nothing has changed from that what was revealed by the search and recorded in the proceedings u/s 143(3) r.w.s. 153A of the Act. It is not a coincidence that almost all entities of this Group viz. Prime Star, Pushpak Gems, Pankaj Exports, and many other identified in the search and seizure operations, find a common pattern of response, presentation of accounts, common auditors, common Authorised Representative, common inter-connected transacting entities and identical nature of businesses. The factual matrix and the nature of activities including those of the inter-connected entities have remained identical to that which existed during the search operations.

5. Accordingly, Assessing Officer issued show cause notice vide letter dated 16.10.2019 to explain why the alleged bogus purchases made from the operators controlled by Shri Bhanwarlal Jain Group should not be treated as income of the assessee. In response assessee did not comply any explanation to the above notice. Accordingly, Assessing Officer proceeded to complete the assessment by addition of ₹.10,95,043/- on account of alleged undisclosed commission income in the hands of the assessee on protective basis, for providing accommodation entries in the form of purchases and loans on behalf of Shri Bhanwarlal Jain and the same income was assessed in the hands of Shri Bhanwarlal Jain on substantive basis. In addition to the above, we find that the Assessing Officer had also made addition on account of Gross Profit in the sum of ₹.68,66,296/- being 10.35% of total turnover of ₹.6,63,41,031/- on account of alleged low profit shown by the assessee in comparison with other entities Gross Profit.

6. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and filed detailed submissions before the Ld.CIT(A) and Ld.CIT(A) after considering detailed submissions of the assessee, sustained the addition made by the Assessing Officer. Against this order of the Ld.CIT(A), assessee is in appeal before us.

7. Assessee has raised following grounds in its appeal: -

"Grounds of appeal against the order dated 30.12.2021 passed by the learned CIT(A)-47, Mumbai u/s. 250 of the Income-tax Act, 1961.

"1. On the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in not considering that the assumption of jurisdiction by the Ld. Assessing Officer is bad in law as the conditions laid down under the Act for initiating reassessment proceeding u/s 147 of the Act have not been fulfilled.

2. On the fact and circumstances of the case and in law the Ld. CIT (A) erred in confirming the addition of alleged commission income arising out of alleged bogus unsecured loans, bogus purchases and bogus sales amounting to Rs. 10,95,043/- on protective basis without appreciating the fact that the same amount has been substantively added in the case of Shri Bhanwarlal Jain, thereby making the same addition in the hands of two assesseees leading to double taxation

3. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming addition of Rs. 68,66,296/- (being 10.35% of Rs. 6,63,41,031/-), on estimation basis, by treating genuine turnover of the appellant as bogus sales.

4. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming the addition of alleged commission income arising out of alleged bogus unsecured loans, bogus sales and bogus purchases and also confirming the addition of gross profit, on estimation basis, of a percentage of the total turnover, without appreciating the fact that both such additions cannot co exist together.

5. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming addition of alleged commission income arising out of alleged bogus unsecured loans, bogus sales and bogus purchases, without appreciating the fact that for the very same assessee for previous assessment years, being A.Y. 2008-09 to A.Y. 2014-15, the Ld. CIT(A) has deleted the protective addition of alleged commission income, thereby not following the principal of consistency.

6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in changing protective addition of commission income on alleged bogus sales to substantive addition on the incorrect presumption that the same was not considered in the order of the Hon'ble ITAT in the case of Shri Bhanwarlal Jain.

7. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in changing protective addition to substantive addition without issuing any show cause notice or opportunity of being heard to the appellant, which is in violation of section 251(2) of the Income Tax Act, 1961 and in violation of the principles of natural justice.*

8 *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in confirming the addition made by ld. AO, without providing any opportunity of cross examination, without any corroborative evidence and without providing copy of statements relied upon.*

9. *The appellant craves to add, alter, classify, reclassify, delete or modify any of the above grounds of appeal and requests to consider each of the above grounds without prejudice to one another."*

8. At the time of hearing, Ld. AR brought to our notice that similar issues were considered by the Coordinate Bench in the case of M/s.Sonam Gems Pvt. Ltd., v. ACIT, CC-1(3) in ITA.No. 315/Mum/2022 for the A.Y.2015-16 and the Coordinate Bench has considered and adjudicated the issue in favour of the assessee and he brought to our notice Para Nos. 4 to 8 of the order (Copy of the order is placed on record).

9. Ld.DR vehemently argued and submitted that the transactions are controlled and carried by the instructions of Mr. Bhanwarlal Jain. He supported the findings of the Assessing Officer/Ld.CIT(A) in this regard. Further, Ld. DR pointed out that the Ld.CIT(A) has rightly observed that Hon'ble ITAT direction in Bhanwarlal Jain case has not been considered certain nature of transaction for applying estimation of income.

10. Considered the rival submissions and material placed on record, we observed that similar issues were considered and adjudicated by the Coordinate Bench in the case of M/s. Sonam Gems Pvt. Ltd., v. ACIT (supra) and decided the issue in favour of the assessee, while holding so, the Coordinate Bench held as under: -

"4. We have heard the rival submissions and perused the materials available on record. The assessee had filed its original return of income on 5.10.2015 declaring total income of Rs 60,380/- Subsequently, the Id. AO received information from the investigation wing of the Income tax department, Mumbai that assessee is one of the concern controlled and managed by Shri Bhanwarlal Jain who used this concern for providing accommodation entries of purchase / sale of diamonds, unsecured loans and advances etc. The Id. AO reopened the assessment by way of issue of notice u/s 148 of the Act on 5/9/2018 after recording reasons for reopening of the assessment. The reassessment u/s 143(3) r.w.s. 147 of the Act was completed on 20/11/2019, wherein the Id. AO made an addition of Rs 19,78,180/- had been added on account of alleged undisclosed commission income in the hands of the assessee on protective basis, for providing accommodation entries in the form of purchases and loans on behalf of Shri Bhanwarlal Jain and the same income was assessed in the hands of Shri Bhanwarlal Jain on substantive basis. In addition to the above, we find that the Id. AO had also made addition on account of Gross Profit in the sum of Rs 4,01,58,089/- being 11.93% of total turnover of RS 35,44,40,325/- on account of alleged low profit shown by the assessee in comparison with other entities Gross Profit.

4.1. We find that the Id. CIT(A) confirmed the protective addition of Rs 19,78,180/- in order to protect the interest of the revenue and to keep the matter alive and also sustained the addition made on account of gross profit in the sum of Rs 4,01,58,089/-, which was done by the Id. AO after rejecting the books of accounts of the assessee.

4.2. We find that the Id. AR before us argued the grounds on merits first, therefore, we have taken up the grounds raised on merits for adjudication. As far as the addition made in the sum of Rs 19,78,180/- towards commission income for providing accommodation entries, we find that the very same sum has been already added in the hands of Shri Bhanwarlal Jain on substantive

basis, on which fact, there is absolutely no dispute. We find that in the assessments framed in the hands of the assessee herein pursuant to search for Asst Years 2008-09 to 2014-15, similar protective addition on account of commission income for providing accommodation entries was deleted by the Id. CIT(A) in the hands of the assessee and the revenue did not even challenge the same further before this tribunal. We further find that the Id. AO in para 6 of his order had emphatically mentioned that all the activities during the previous year relevant to the block period are identical to that of the assessee's activities during the previous year under consideration. While this is so, there is no reason for the Id. CIT(A) to take a divergent stand of confirming the protective addition of commission income in the hands of the assessee herein for the Asst Year 2015-16. Moreover, for the same block period pertaining to Asst Years 2008-09 to 2014-15, we find that this tribunal in ITA No. 2669/Mum/2018 dated 6.8.2021 had estimated the commission income in the hands of Shri Bhanwarlal Jain on substantive basis. Hence consistently, the substantive addition has always been made only in the hands of Shri Bhanwarlal Jain for this commission income. Hence there could be no confusion that would lie in the mind of the revenue, as to in whose hands this commission income should be assessed, in order to justify its protective addition. Hence we direct the Id. AO to delete the protective addition of commission income of Rs 19,78,180/- made in the hands of the assessee herein for the Asst Year 2015-16.

5. *With regard to the addition of Gross profit made in the sum of Rs 4,01,58,089/- on account of alleged low gross profit declared by the assessee, we find that the Id. AO had estimated the gross profit of the assessee by taking a view without prejudice to the addition of alleged undisclosed commission income. This addition was solely made on the basis that the assessee had shown less gross profit as compared to the other alleged concerns of Shri Bhanwarlal Jain. We find that the very same issue was subject matter of adjudication by this tribunal in the case of Rose Impex vs ACIT in ITA No. 622/Mum/2021 dated 29.3.2022, which is one of the alleged concerns of Shri Bhanwarlal Jain. The relevant operative portion of the said tribunal order is reproduced hereunder:-*

8. *However, the A.O has made another addition on the ground that gross profit rate declared by the assessee in the year under consideration is too low i.e 1.19% as compared to the gross profit percentage declared by other such concern of the Shri Bhanwarlal Jain group. The A.O adopted average gross profit rate of 11.5% and made addition for the difference in gross profit rate of 10.31% [11.5 (-) 1.19] and computed addition of rs.2,71,98,014/-. Before us, the*

Id. Counsel of the assessee has submitted that on one side, on the basis of evidences found during the course of survey/search in the case of Shri Bhanwarlal Jain, the A.O has treated the assessee as not engaged in genuine business of the trading of diamond and held to be accommodation entry provider and assessed on protective basis. Whereas on the other hand, the A.O is making addition treating the business of trading of diamond recorded in books of account as genuine and making addition for low gross profit rate. The Id. CIT(A) has also confirmed this addition to compensate low gross profit rate. The Id. Counsel of the assessee submitted that the Income-Tax authorities cannot blow hot and cold in the same breath. According to him if Income Tax Department has accepted the assessee as controlled and managed by Shri Bhanwarlal Jain for providing accommodation entries, then addition to compensate gross profit rate is not justified. The Id. D.R also could not controvert the fact that the assessee has been held a concern controlled by Shri Bhanwarlal Jain engaged only for providing accommodation entry bills. In our opinion such circumstances, the lower authorities are not justified in sustaining the addition to cover the low gross profit rate on the basis of books of account of the assessee which has not been accepted by the department and percentage commission has been assessed treating the purchase and sales recorded in books of accounts. Similarly commission income has also been estimated on the unsecured loan advanced by the assessee also. We have noted that in the case of Bhanwarlal Jain, the department has taken stand that accommodation entries have been provided through the assessee concern. The revenue has to take one stand and cannot treat the assessee simultaneously as accommodation entry provider as well as genuine concern engaged in trading of the diamond. In view of the above discussion, we set aside the finding of the Id. CIT(A) on the merit of the addition and direct the A.O to delete the addition of Rs.2,71,98,014/-.

5.1. Respectfully following the aforesaid order of this tribunal, we delete the addition made on account of Gross profit of Rs 4,01,58,089/- in the hands of the assessee herein for the Asst Year 2015-16.

6. We further find from the perusal of the order of the Id. CIT(A) that an addition towards commission income of Rs 2,65,830/- being 0.075% of total sales turnover was converted from protective to substantive basis by the Id. CIT(A). We find that the total sales

turnover figure is Rs 35,44,40,325/-. We find that the Id. AO had sought to add commission income @ 0.075% on this turnover on the premise that no addition of commission income has been made for accommodation entry of sales. We find from the perusal of the assessment order that the Id. AO had already estimated the commission income on this sales figure also which is very much evident from the table prepared by the Id. AO in para 12 of his order. Commission on bogus sales is already added in the sum of Rs 2,65,830/- by the Id. AO and the said figure is duly included in the total commission income figure of Rs 19,78,180/- made by the Id. AO on protective basis. Hence adding the very same sum again would only result in double addition and hence directed to be deleted herein.

6.1. Moreover, we find that the Id. CIT(A) had sought to make this addition of Rs 2,65,830/- on substantive basis. In our considered opinion, conversion of protective addition into substantive addition would tantamount to enhancement of income made by the Id. CIT(A), which could be done only after issuance of enhancement notice to the assessee. Admittedly, no such enhancement notice in terms of section 251(2) of the Act has been given to the assessee by the Id. CIT(A). On this count itself, this addition made on substantive basis in the sum of Rs 2,65,830/- towards commission on bogus sales is deleted.

6.2. Further we find that the Id. CIT(A) by placing reliance on the order of this tribunal in the case of Shri Bhanwarlal Jain in ITA No. 2669/Mum/2018 dated 6.8.2021 had incorrectly concluded that the said order of Shri Bhanwarlal Jain did not consider the addition on account of commission on sales, and accordingly made substantive addition in the hands of the assessee. This is factually incorrect in as much as we find that this tribunal had duly considered the addition on account of alleged commission on sales in the order of Shri Bhanwarlal Jain in Page 30 under point 2 of the table under the caption "Accommodation entries of bogus purchases provided by assessee". If entries of bogus purchases are provided by assessee, then the same represents sales made by assessee. This has not been understood by the Id. CIT(A) while making this substantive addition. In any case, the substantive addition of commission income has already been made in the hands of Shri Bhanwarlal Jain and the similar addition was also confirmed in his hands during the block period also. Hence there cannot be any further addition of Rs 2,65,830/- in the hands of the assessee herein even on protective basis. Accordingly, the same is deleted.

7. In view of the aforesaid observations, all the additions made in the hands of the assessee herein are deleted.

8. *Since we have already allowed the appeal of the assessee on merit, the ground raised by the assessee challenging the legality / validity of reassessment proceedings has been rendered academic and therefore we are not adjudicating the same and the same is left open."*

11. Since the issue is exactly similar and grounds as well as the facts are identical, respectfully following the above said decision, we allow the grounds raised by the assessee. We order accordingly.

12. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 10th November, 2022.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER
Mumbai / Dated 10.11.2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum