

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'G' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 1008/Mum/2011 (A.Y. 2006-07)

DCIT-16(3) Mataru Mandir Room No. 206 Tardeo Road Mumbai-400 007.	Vs.	M/s. Gautamkumar & Co. 347/A, Panchratna Opera House Mumbai-400 004.  PAN : AAAFG1360R
(Appellant)		(Respondent)

Assessee by	Shri Bhupendra Shah
Department by	Shri Neerja Sharma
Date of Hearing	09.02.2023
Date of Pronouncement	16.02.2023

ORDER

Per B.R.Baskaran (AM) :-

The revenue has filed this appeal challenging the order dated 13.10.2020 passed by Ld CIT(A)-27, Mumbai and it relates to the assessment year 2007-08. The revenue is aggrieved by the decision of Ld CIT(A) in deleting the addition of Rs.4,11,91,000/- made by the AO.

2. The facts relating to the above said issue are stated in brief. The assessee is a partnership firm and is engaged in the business of manufacture, import and export of diamonds studded jewellery, gold jewellery, imitation jewellery etc. The revenue carried out a survey operation in the hands of the assessee on 1.10.2007. This survey operation was conducted in consequent to another survey operation conducted in the hands of M/s S.R Co (Patel Somabhai Ramdas & Co) on 10.01.2007, i.e., about nine months back. During the course of survey operation conducted in the hands of M/s S R Co, seven cheques issued by the assessee company mentioning the amounts only, which aggregated to Rs.4,11,91,000/-, were

found. The cheques did not have date or payee name. The partner of the assessee firm Shri Gautam G Mehta was questioned about the above said cheques given to M/s S R Co during the course of survey operation. A statement on oath was taken from him, wherein he explained money that the firm mobilized cash by giving these cheques and the said cash was used to purchase diamonds. He further stated that he did not make any profit in the said deal. However, he agreed to surrender above said amount of Rs.4,11,91,000/- as income of the assessee firm for AY 2007-08. However, in the return of income filed for that assessment year, the assessee did not declare the above said amount. Subsequently, Shri Gautam G Mehta filed an affidavit on 12.09.2008 (almost after one year) retracting the statement given by him. Hence, the AO did not accept the retraction and accordingly assessed the above said amount of Rs.4,11,91,000/- as income of the assessee. The Ld CIT(A) deleted the addition and hence the revenue has filed this appeal before the Tribunal.

3. We heard the parties and perused the record. We notice that the Ld CIT(A) has deleted the addition on the following reasoning:-

- (a) The assessee has admitted the income in the statement taken at mid night, when he was under mental imbalance.
- (b) The assessee has explained that the above said cheques were given to one Mr Rajendra Agarwal, since the managing partner travelled to USA in January 2005 and those cheques could be used to make payments in case good purchase deal was done. This was also confirmed by Mr Rajendra Agarwal. The cheques were lying with him uncollected by the assessee.
- (c) Even though the above said cheques were issues, the concerned bank accounts did not have major bank balances.
- (d) Hence the retraction of the statement has been made on credible reasoning.
- (e) In the original statement, the assessee has stated that it has mobilized cash by using cheques since it got good deal for purchase of diamonds at lower rates. However, the things did not happen as

expected and the assessee could hardly break-even on sale of those diamonds. Hence the assessee could not have made any profits in the sales, if the statement is accepted as true.

- (f) The statement taken during the course of survey does not have evidentiary value as per the decision rendered by Hon'ble Madras High Court in the case of S Khader Khan Son (300 ITR 157).
- (g) All the facts read together would clearly point out that in the first place, there was no transaction outside the books as alleged in the Statement recorded/assessment order passed. Secondly, no taxable income was generated even if the transaction is presumed to be correct for a moment. Thirdly, there is no corroborative evidence brought on record to show that the contents of the statement recorded are true and correct.

4. We notice that the ld CIT(A) has given much importance to the retraction statement of the assessee. But the fact remains that the retraction has been done after almost one year. The settled proposition of law is that the retraction should be done with earliest possible opportunity and further it should be corroborated by the assessee. We notice that the Ld CIT(A) has put the responsibility upon the AO and has observed that the AO has not brought on record any corroborative evidence, which is not justified. Accordingly, we are of the view that the retraction of statement by the assessee is liable to be rejected.

5. In our view, there is one more reason for rejecting retraction, i.e., the reasoning given by the assessee for giving cheques to S R Co also defies logic. On the one hand, it is stated that the cheques were given to S R Co, so that the same can be used to strike good deal in diamond purchase. On the other hand, it is stated that the concerned bank accounts did not have enough bank balances. If the bank accounts did not have enough balances, how S R Co could have used the cheques to purchase diamonds on behalf of the assessee. Hence the reasoning given in the retraction statement about the cheques defies logic and hence on this count also retraction is liable to be rejected.

6. The Ld CIT(A) has also stated that the statement taken during the course of survey operations does not have evidentiary value. But the fact remains that the assessee has only explained the purpose of giving cheques to S R Co and it is not a case of general statement extracted from the assessee. The explanation of the assessee given in the statement is that the above said cheques were given to mobilize money for striking good deal in diamond purchase. In our view, the assessee could not bring any material to contradict the statement so given. On the contrary, the cheques were found with S R Co. Hence the legal principle that the statement given during the course of survey does not have evidentiary value will not apply to the facts and circumstances of the present case.

7. However, in our view, there is merit in the submission made by the assessee before Ld CIT(A), i.e., mere mobilization of money on the security of cheques will not give rise to any income transaction liable to be taxed. The statement given by the assessee is that he has purchased diamonds by using the cash so mobilized and sold the same. Accordingly, the profit, if any, generated from the above said purchase and sale transactions is liable to be taxed.

8. However, the assessee has stated that it did not make any profit from the transactions. The fact remains that the assessee could not substantiate this statement with any credible evidence, even though it is the responsibility of the assessee to prove the same. It is hard to believe that it did not make any profit on the purchase and sale of diamonds. Accordingly, we are of the view that the profit generated from the above said purchase and sale transactions is required to be estimated in the facts and circumstances of the case. The normal profit rate adopted for diamond business is around 3% of the sale value. Accordingly, we are of the view that the profit from the sale of diamonds purchased out of the balance of Rs.4,11,91,000/- may be estimated @ 3% of Rs.4,11,91,000/- and the same, in our view, will meet the ends of justice.

9. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to estimate the profit on sale of diamonds @ 3% of Rs.4,11,91,000/- and assess the same.
10. In the result, the appeal filed by the revenue is partly allowed.

Pronounced in the open court on 16.2.2023.

Sd/-  
(PAVAN KUMAR GADALE)  
Judicial Member

Sd/-  
(B.R. BASAKARAN)  
Accountant Member

Mumbai; Dated : 16/02/2023

Copy of the Order forwarded to :

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

//True Copy//

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BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai