

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

BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.3091/Mum./2022
(Assessment Year : 2011-12)

Eeva Exports
306/306-A, Regal Diamond Centre
3rd Floor, Tata Road no.2
Opera House, Mumbai 400 004
PAN - AACFE3203D

..... Appellant

v/s

Income Tax Officer-19(1)(3),
Mumbai

.....Respondent

Assessee by : Shri Rajnish Aggarwal
Revenue by : Ms. Indira Adakil

Date of Hearing - 13/02/2023

Date of Order - 20/02/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The captioned appeal has been filed by the assessee challenging the impugned order dated 15/06/2022, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [*learned CIT(A)*], for the assessment year 2011-12.

2. The present appeal is delayed by 101 days. The assessee has filed an application seeking condonation of delay supported by an affidavit sworn by partner of the assessee firm. In the application, it is submitted that the

impugned order passed by the learned CIT(A) was served to the assessee over email and the same came to the knowledge on 30/06/2022. It is further submitted that the counsel of the assessee at that time advised that the appeal before the Tribunal is required to be filed online on the online portal, which was non-functional due to technical reasons. In December 2022, the assessee changed its counsel, who advised the assessee that the appeal before the Tribunal cannot be filed online and the same is required to be filed manually. Only thereafter, the present appeal was filed before the Tribunal on 08/12/2022. Accordingly, it is submitted that the delay in filing the present appeal is neither wilful nor deliberate but due to a lapse in understanding the method of filing the appeal before the Tribunal.

3. On the other hand, the learned Departmental Representative ("*learned DR*") did not raise serious objections against the application seeking condonation of delay in filing the present appeal.

4. Having considered the submissions of both sides and perused the application seeking condonation of delay along with the affidavit filed by the assessee, we find that the assessee claims that due to the advice of the counsel that appeal before the Tribunal can only be filed online on the online portal, which was not functional due to technical reasons at that time, the appeal could not be filed within the prescribed limitation period. As per the assessee, only after it engaged the present counsel, it was advised to file the appeal manually before the Tribunal and accordingly, the same was filed on 08/12/2022. In the present case, the assessee received the impugned order on 30/06/2022. Thus, as per the provisions of section 253(3) of the Act, the

assessee was required to file the appeal within 60 days from the date of receipt of the order. From the challan in ITNS 280 in respect of appeal filing fees, annexed along with the appeal, we find that the assessee paid the appeal filing fees of Rs.10,000 on 22/08/2022, i.e. before the expiry of the limitation period. Thus, once the assessee had paid the appeal filing fees within the limitation period, it is difficult to assume that the assessee had no intention to also file the appeal within the limitation period. Therefore, in view of the submissions made in the application, which is also supported by an affidavit, we are of the considered view that there exists sufficient cause for not filing the present appeal within the limitation period and thus, we condone the delay in filing the appeal by the assessee and we proceed to decide the appeal on merits.

5. In this appeal, the assessee has raised the following grounds:-

"1. The Ld. Commissioner of Income Tax (Appeals) (NFAC) erred in law and facts in confirming the action of the Ld. Assessing Officer w.r.t. re-opening of the case of the appellant for the Asst. Year 2011-2012 by issuing notice issued u/s 147 of the I. Tax Act, without complying with the conditions stipulated u/s 147 to 150 of the I. Tax Act resulting in the assessments so framed vide order dated 13 December, 2018 illegal, invalid and void ab initio.

2. The Ld. Commissioner of Income Tax (Appeals) (NFAC) erred in law and facts in confirming the action of the Ld. Assessing Officer who formed his opinion for escapement of income merely on the basis of information received from the Investigation wing of the 1. Tax Department Mumbai without making any enquiry at his end, thereby the assessment so framed u/s 147 r.w.s 143(3) of the 1. Tax Act becoming illegal, invalid and void ab initio and liable to be quashed.

3. The Ld. Commissioner of Income Tax (Appeals) (NFAC) erred in law and facts in restricting the addition to Rs. 3,50,162/- (25% of Rs. 14,00,650/-) thereby confirming the action of Ld. Assessing Officer in considering it to be a bogus purchase on the basis of information received from Investigation Wing of the Income Tax Department. Mumbai ignoring the fact that the appellant is maintaining proper books of account, purchase and sales are supported by vouchers complete stock tally is maintained, particularly against the alleged bogus purchase made from Mayank Impex which is supported by corresponding

sale of the item purchased and duly recorded in the audited books of account of the appellant. Therefore, the action of CIT (Appeals) (NFAC) in restricting the addition to Rs. 3,50,162/- is illegal, invalid and void ab initio.

4. The Ld. Commissioner of Income Tax (Appeals) (NFAC) erred in law and facts in confirming the action of the Ld. Assessing Officer without appreciating the fact that the appellant has genuinely purchased goods from Mayank Impex making payments through official banking channels and has made corresponding sale of the item alleged to be bogus purchase, which is arbitrary unjustified, illegal and against the facts of the case.

5. The "reasons to believe" must show live link and nexus with the formation of prima facie opinion that income which should be taxed has escaped assessment. In absence of any cogent and relevant material or information, re-assessment proceedings could not have been initiated, thereby making the assessment so framed u/s 147 r.w.s 143(3) vide order dated 13th December, 2018 illegal, invalid and void ab initio.

6. Without prejudice to the above the Assessing Officer, erred in law and facts by forming 'reasons to believe' of escapement of income by solely relying upon the information received from investigation wing, without making any inquiry whatsoever at his end, flouting the well-established principles laid down by various hon'ble High Court(s) as well as Hon'ble Supreme Court, thereby, the proceedings initiated under section 148 are invalid, illegal & void abinitio.

7. The above grounds of appeal are without prejudice to one another.

8. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

6. During the hearing, at the outset, the learned Authorised Representative ("learned AR") wishes not to press grounds no.1, 2, 5 and 6 challenging the initiation of proceedings under section 147 of the Act. Accordingly, grounds no. 1, 2, 5 and 6 as dismissed as not pressed.

7. The issue arising in ground no.3 and 4, raised in assessee's appeal, is pertaining to disallowance made on account of non-genuine purchases.

8. We have considered the rival submissions and perused the material available on record. The brief facts of the case are that the assessee is a partnership firm and is engaged in the business of trading in rough and

polished diamonds. For the year under consideration, the assessee filed its return of income on 31/08/2011, declaring a total income of Rs.8,042. The return filed by the assessee was initially processed under section 143(1) of the Act. Thereafter, on the basis of information received from DGIT (Inv.), Mumbai, proceedings under section 147 of the Act were initiated, and notice under section 148 of the Act was issued on 27/03/2018, in the case of the assessee. As per the said information, the assessee is a beneficiary of bogus purchases from a concern, viz. M/s Mayank Impex, of Rajendra Jain Group, who are entry/accommodation bills provider. Accordingly, in absence of proof of the genuineness of purchases made by the assessee, the Assessing Officer vide order dated 13/12/2018, passed under section 143(3) r.w.s. 147 of the Act treated the entire purchase of Rs.14,00,650, from the aforesaid entity as bogus and added the same to the total income of the assessee. In further appeal, the learned CIT(A), inter alia, granted partial relief to the assessee and restricted the addition to 25% of the total purchases made from the aforesaid entity.

9. It is an admitted position that the Revenue has not challenged the partial relief granted by the learned CIT(A). Further, the sales made by the assessee have not been disputed by the Revenue. In the present case, as per the assessee, it purchased one loose polished diamond of 2.57 carats from M/s Mayank Impex for a total consideration of Rs.14,00,650, which was sold for Rs. 14,39,200. Thus, as per the assessee, it earned a gross profit of 2.75% on the above alleged non-genuine transaction, which has been offered for taxation. As per the report of the Task Force for Diamond Sector constituted

by the Ministry of Commerce and Industry after considering the BAP (Benign Assessment Procedure) scheme, the Task Force recommended that the net profit prevailing in the Diamond Industry engaged in the business of trading would be in the range of 1% - 3% and those engaged in the business of manufacturing would be in the range of 1.5% - 4.5%. We find that the coordinate bench of the Tribunal has been consistently taking the stand by estimating the profit element on the basis of reliance placed on the aforesaid report of the Task Force. In the present case, there is no dispute regarding the fact that the assessee is also in the business of trading in diamonds. Considering the same, we deem it appropriate to restrict the disallowance to 3% being the estimated gross profit of the bogus purchases. We order accordingly. As the assessee claims that it has already offered to tax gross profit of 2.75% on the aforesaid transaction. Therefore, we direct the Assessing Officer to verify the aforesaid submission and grant relief to the assessee to the extent the gross profit, on the non-genuine purchases, has already been offered to tax by the assessee. As a result, grounds no.3 and 4 raised in assessee's appeal are partly allowed.

10. In the result, the appeal by the assessee is partly allowed.

Order pronounced in the open Court on 20/02/2023

Sd/-
M. BALAGANESH
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 20/02/2023

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai