

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

BEFORE SHRI N. K. CHOUDHRY, JM

**I.T.A. No. 2926/Mum/2022
Assessment Year: 2015-16)**

Laxmi Diamonds
316, Panchratna, Opera
House, Mumbai- 400004

Vs.

ACIT, CC-1(3)
M.K. Road, Churchgate,
Mumbai- 400020

PAN No. **AAEFL4266F**

**I.T.A. No.2927/Mum/2022
Assessment Year: 2015-16)**

Varsha Gems
105, Panchratna, Opera
House, Mumbai- 400004

Vs.

ACIT, CC-1(3)
M.K. Road, Churchgate,
Mumbai- 400020

PAN No. **AAKFV7060R**

Appellant) : Respondent)

Appellant by : Shri. Suchek Anchaliya &
Shri. Tushar Nagori

Respondent by : Shri. Anurag Tripathi

Date of Hearing : 28.08.2023

Date of pronouncement : 31.08.2023

O R D E R

Per N. K. Choudhry, JM:

The Assessee/Appellant herein has preferred this appeal against the order dated 25.11.2019 impugned herein passed by Ld. Commissioner of Income Tax/National Faceless Appeal Centre {in short 'Ld. Commissioner')} u/s 250 of the Income Tax Act 1961 (in short 'the Act').

2. In both the appeals under consideration, the issues involved are similar, therefore for the sake of brevity, the same are disposed off by composite order and ITA no 2926/M/2022 as a lead case.

3. **ITA no 2926/M/2022** - The Assessee being engaged in the business of import, export and trading of cut, polished and rough diamonds, declared its total income of Rs. 46,010/- by filing return of income on 25.09.2015 for the year under consideration. Subsequently, on the basis of search and seizure operation u/s 132 of the Act carried out in the case of Shri Bhanwarlal Jain group by the investigation Wing, Mumbai on dated 03.10.2013, wherein Shri Bhanwarlal Jain admitted in his statement dated 11.10.2013 recorded u/s 132(4) of the Act to the effect that he is engaged in issuing accommodation entries for bogus loans/sales/import through 70 concerns operated by him. Further, the concern M/s Laxmi Diamonds of Bhanwarlal Jain group has also been engaged in issuing accommodation entries and bogus loans and advances/purchases/sales in the AY 2015-16 which is as under:-

Name of Assessee	Amount of purchases (Rs.)	Commission on purchases @ 0.075% (Rs.)	Amount of Sale (Rs.)	Commission on sales @ 0.075% (Rs.)	Amount of Loans/Advances (Rs.)	Commission on loans/Advances @ 2.4% (Rs.)	Total Bogus Commission (Rs.)
M/s Laxmi Diamonds	3832838	28746	32701928	24526	41594489	998267	1051540

4. The Assessing Officer recorded the reason and re-opened the case of the Assessee u/s 147 of the Act and issued notice dated 05.09.2018 u/s 148 of the Act, in response to which the Assessee filed its return of income dated 25.10.2018 declaring total income of Rs. 46,010/- as disclosed earlier in original return of income. Thereafter statutory notices have also been issued to the Assessee, in response to which the Assessee filed submission/details. The Assessing officer though considered the submissions/reply of the Assessee,

however mainly relying upon the statement of Mr. Bhanwarlal Jain ultimately held "that all loans parties as mentioned in the regular books of account of the Bhanwarlal Jain group, have taken accommodation entries of bogus loans and bogus purchases from the respective benami concern which includes the Assessee", and consequently made the addition of Rs. 9,46,386/- in hands of the Assessee on protective basis, by observing as under:-

12. Working of Commission on various accommodation entries:-

As it has been proved beyond doubt that the assessee is not carrying out any genuine business of trading in diamonds but is solely used for giving accommodation entries by Bhanwarlal Jain and Family and assessee is only an associate.

It may be pertinent to mention here that there is no denying the fact that assessee has to incur some day to day expenses like stationery, conveyance, office expenses and rent etc. for earning the above commission income. As such, it would be just and proper, if a certain percentage of commission income on estimated basis is allowed to the assessee. Accordingly, 10% of the commission income is considered as reasonable towards expenses for earning the said undisclosed commission income which would meet the ends of justice.

Sr. No.	Nature of accommodation entry	Amount of commission earned discussed above
1.	Accommodation of bogus unsecured loan (On proportionate basis on Rs. 41594489/- @ 2.4% p.a.)	Rs. 998267/-
2.	Accommodation of bogus purchases (0.075% of Rs. 38328385/-)	Rs. 28746/-
3.	Accommodation of bogus sales (0.075% of Rs. 32701928/-)	Rs. 24526/-
4.	Total Commission	Rs. 10,51,540/-

5.	Less; 10% of total commission as discussed above	Rs. 1,05,154/-
6.	Undisclosed commission income	Rs. 9,46,386/-

*In the instant case, the total undisclosed commission which is required to be added is Rs.9,46,386/-. However, it is observed that the undisclosed commission of Rs.9,46,386/-is added on substantive basis in the case of Shri Bhanwarlal Jain for AY 2015-16. Hence, to protect the interests of Revenue and following principles of Natural Justice. **Rs.9,46,386/-is hereby added in the hands of the assessee on protective basis.** Penalty proceedings u/s 271(1)(b) & 271(1)(c) of the IT Act are initiated separately for filing of inaccurate particulars of income.*

5. The assessing officer also estimated/adopted gross profit percentage at 11.5% instead of 0.71% as declared by the Assessee on total turnover of Rs. 3,27,01,928/- and consequently, added the amount of Rs. 35,28,528/- being difference in gross profit percentage of 10.79% (11.5-0.71) in the income of the Assessee, by concluding as under:-

13.3 As mentioned above, the assessee has shown a huge turnover of Rs.3,27,01,928/-. However, the assessee has failed to submit the transaction wise details as called for vide notice u/s 142(1) of the IT Act dated 03/11/2019. Furthermore, the assessee has also failed to submit any information regarding the purchases, corresponding payments made for purchases, the effect of such purchases in the stock maintained, sales made, receipt of sales proceeds and the corresponding effect in the stock register. Thus, the assessee has not submitted any detail in respect of the items of its P&L account including expenses debited. Hence, it is evident that the profit and income as declared by the assessee in its P&L account is not substantiated by supporting documentary evidences and the same is hereby rejected in absence of the details of expenses, stock etc.

13.4 In view of the above, the income of the assessee is estimated as a percentage of turnover. The case records of the entities of BhanwarLal Jain group available in this office have been perused. It is observed that all the group entities have claimed to be in the business of trading in diamonds.

Furthermore, as discussed earlier, all the entities are following same modus operandi. As the whole group has claimed to be in the same business of Diamond trading, the business is being conducted in identical circumstances and environment, the gross profit involved should be more or less similar. The gross profit percentage of a few of the entities for AY 2014-15 were perused and the same is reproduced hereunder.

Sr. No.	Name	GP for AY 2014-15
1.	Shri Ritesh Siroya	13.70
2.	M/s Meridian jewellery Pvt Ltd	11.35
3.	M/s Meridian Gems	11.00
4.	M.s Little Diam	10.29

It is observed from the above chart that gross profit percentage for AY 2014-15 has varied from 10.29 % to 13.70%. Thus, a realistic percentage of gross profit in the business, as claimed by the assessee, would be the average of the above mentioned percentages. The average percentage works out to 11.5%. The business of the assessee has not changed between AY 2014-15 to AY 2015-16 and most of the conditions have remained unaltered. The meager gross profit of 0.71 % as declared by the assessee for AY 2015-16 is unacceptable. Further, the assessee has also failed to submit any documentary evidence or detail to substantiate such a meager gross profit. Hence, in view of the above discussion, the gross profit percentage of the assessee for the year under consideration (ie: AY 2015-16) is adopted at 11.5 %. The assessee has declared a GP of 0.71 %. Hence, the difference in Gross profit percentage of 10.79 % (11.5-0.71) is required to be added as income of the assessee for AY 2015-16. Accordingly, an amount of Rs 35,28,538/- (10.79 % of 32701928) is hereby added to the total income of the assessee. Penalty proceedings u/s 271(1)(c) of the I T Act are initiated separately for filing of inaccurate particulars of income.

6. The Assessee being aggrieved challenged the reopening of the assessment as well as said additions before the Ld. Commissioner, who not only confirmed the reopening of the assessment u/s 147 r.w.s. 148 of the Act but also affirmed the

additions on merits. The Assessee being aggrieved has referred this appeal and raised the following grounds of appeal reproduced as under:-

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. 9,46,386/- 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 assessee 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. 35,28,538/- (being 10.79% of Rs. 3,27,01,928/-), 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. 2013-14 and 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 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.*

8. *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.*

7. I have heard both the parties and perused the material available on record. **Ground no. 1** pertains to the re-opening of the case u/s 147 of the Act, which the Assessee has specifically not raised, hence needs no adjudication.

8. **Ground nos. 4 to 8** are somewhat in the form of arguments or the formal in nature, hence need no specific adjudication.

9. Coming to the **Ground no 2** which pertains to the making of addition of Rs. 9,46,386/- on protective basis. I observe that Hon'ble Co-ordinate Bench of Tribunal in M/s. Sonam Gems Pvt. Ltd. & Ors {ITA 315/M/2022 decided on dated 9th Jun 2022} also dealt with the identical issue/situation wherein similar protective addition on account of commission has been made by the assessing officer on the basis of statement made by Shri Bhanwarlal Jain Group in whose hands the substantive addition was made. The Hon'ble Bench ultimately deleted the protective addition qua commission income, by concluding 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 ld. 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 ld. 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 ld. 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 ld. 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 ld. 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 ld. AO after rejecting the books of accounts of the assessee.

4.2. We find that the ld. 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 ld. 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 ld. 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 ld. 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 ld. 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.

10. The Assessee also claimed that the similar addition was also made by the then AO in the AYs 2013-14 and 2014-15 which has been deleted by Ld. Commissioner and not refuted by the revenue department.

10. I have given thoughtful consideration to the peculiar facts and circumstances of the case and observe that the substantive addition has also been made in the case of Shri Bhanwarlal Jain and the Tribunal has already taken into consideration the said facts and decided to delete the protective addition in other similar cases. Further though the assessing officer made the addition of Rs. 10,51,540/- in total (Rs. 9,98,267/- on account of accommodation and bogus and unsecured loans (of Rs. 4,15,94,489/- at the rate of 2.4% p.a.) + Rs. 28746/- and Rs. 28,526/- respectively on account of accommodation of bogus sales at the rate of 0.075% of Rs. 38288385/- and Rs. 32701928/- respectively, however given a relief @ 10% of the total commission, which comes to Rs. 105154/- and ultimately made the protective addition of Rs.9,46,386/- on account of undisclosed commission income. Respectively following the decision of the Tribunal in ITA 315/M/2022 and others

decided on dated 9th Jun 2022 wherein the similar addition has been deleted, and considering the fact the Ld. CIT(A) in the Assessee's own cases for the AYs 2013-14 and 2014-15 has also deleted the similar addition, I am inclined to delete the addition of Rs. 9,46,386/- in hand, hence the same is deleted. Consequently the **Ground no.2** is allowed.

11. Coming to **Ground no. 3**, which pertains to the confirmation of the addition of Rs. 35,28,528/- (being 10.79% of Rs. 3,27,01,928/-) as gross profit rate on estimation basis, by treating turnover of the Assessee as bogus sales. I observe that the Hon'ble Co-ordinate Bench of Tribunal in ITA No. 315/M/2022 (supra) has also dealt with the identical addition on account of gross profit rate applied and while taking into consideration the adjudication of the identical issue by the Tribunal in the Case of Rose Impex vs ACIT (ITA No. 622/M/2021) decided on 29.03.2022 deleted the similar addition by holding as under:-

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 ld. 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 ld. 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 ld. CIT(A) has also confirmed this addition to compensate low gross profit rate. The ld. 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 ld. 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 ld. 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 ld. 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 ld. CIT(A). We find that the total sales turnover figure is Rs 35,44,40,325/-. We find that the

ld. 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 ld. AO had already estimated the commission income on this sales figure also which is very much evident from the table prepared by the ld. AO in para 12 of his order. Commission on bogus sales is already added in the sum of Rs 2,65,830/- by the ld. AO and the said figure is duly included in the total commission income figure of Rs 19,78,180/- made by the ld. 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 ld. 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 ld. 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 ld. 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 ld. 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 ld. 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.

12. Respectfully following the decision of the Hon'ble Co-ordinate Bench of Tribunal, we are inclined to delete the addition of Rs. 35,28,528/- in hand, hence the same is also deleted. Consequently, **Ground no. 3** is also allowed.

13. Resultantly, the appeal i.e. **ITA No. 2926/M/2022** is partly allowed.

14. In the result, view of our judgment in ITA No. 2926/M/2022, both the appeals filed by the Assessee stands partly allowed.

Order pronounced in the open court on 31.08.2023.

Sd/
(N. K. CHOUDHRY)
Judicial Member

Mumbai, Dated: 31/08/2023
Shubham Lohar

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt.Registrar)

ITAT, Mumbai