

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 1497/Mum/2023 (A.Y. 2020-21)

Dy. Commissioner of Income Tax,

Central Circle- 2(4), Room No. 802, 8th Floor,
Pratistha Bhawan, M.K. Road,
Church gate, Mumbai - 400 020.

..... Appellant

Vs.

M/s. Ronak Gems Pvt. Ltd.,

311, Mehta Bhawan, Shop No. 5,
Opp. Charni Road, Mumbai – 400 020.

..... Respondent

Appellant by : Shri Nishit Gandhi, Ld. AR
Respondent by : Smt. Sanyogita Nagpal, Ld. DR
Date of hearing : 13/03/2024
Date of pronouncement : 16/05/2024

ORDER

PER GAGAN GOYAL, A.M:

This appeal by the Revenue is directed against the order of the Ld. CIT (A)- 48, Mumbai, dated 09.02.2023 u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2020-21. The Revenue has raised the following grounds of appeal: -

"Grounds of Appeal"

1. Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) was justified in restricting the addition made by the AO amounting Rs. 3, 90, 16,241/- u/s. 69C on account

of bogus purchases to only 12.5% of the purchase amount, without appreciating that the assessee was Issuing fake Invoices and could not prove genuineness of these purchases.

2. Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) was justified in restricting the addition made by the AO amounting Rs. 1, 43, 87,808/- u/s. 69A on account of cash sales to only 1.1% of the sale amount, without appreciating that the assessee was issuing fake invoices and did not prove genuineness of these sales.

3. Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) was justified in deleting the addition made by the AO amounting to Rs. 16,36,000/- u/s. 69A on account of unexplained cash seizure without appreciating that the assessee was not able to prove the source of said cash.

4. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in restricting the addition made by the AO on account of stock discrepancy to only 1.1% of the amount, considering that discrepancies were found in the stock register and the physical stock and the assessee was not able to reconcile the same either during search proceedings or assessment proceedings.

2. The brief facts of the case are that the assessee company filed its return of income on 15.01.2021 declaring total income at Rs. NIL under the normal provisions of the Act and at Rs. 69, 43,045/- u/s. 115JB of the Act. A search and seizure operation was carried out at the premises of the assessee on 11.10.2019. The case of the assessee was selected for scrutiny. The assessee was engaged in the business of diamond merchant and commission agent dealing in rough, cut and polished diamonds, gold bars, platinum, pearls, precious and semi-precious stones and jewelery in gold/silver studded with diamond/pearls/precious stones/semi-precious stones etc. The assessee has 2 Branches (Borivali and Walkeshwar), 1 Safety Vault (M/s. Sidhhi Safe Vaults Pvt. Ltd.) and a head office to run the business. The case of the assessee was assessed at Rs. 6, 64, 13,369/- under the normal provisions of the Act and at Rs. 7, 33, 56,684/- under the provisions of section 115JB of the Act. The

assessee being aggrieved with this order of AO preferred an appeal before the Ld. CIT (A)-48, Mumbai, who in turn allowed the appeal of the assessee substantially, against which revenue is in appeal before us. The assessee also filed a cross-objection against the order of Ld. CIT (A), where the issue was not decided in its favour.

3. We are deciding the appeals of revenue first as substantial issues are involved in this appeal. We have gone through the order of the AO passed u/s. 143(3) of the Act, Order of the Ld. CIT (A) passed u/s. 250 of the Act and submissions of both sides along with grounds raised. The revenue has raised a total of four substantive grounds for adjudication. Our Ground-wise adjudication of grounds raised by the revenue will be there in the order in the coming paras.

4. **Ground No. 1 pertains to the deletion of the addition of Rs. 3, 90, 16,241/- and substituted with an application of G.P @ 12.5% amounting to Rs. 48, 77,030/-.** Relevant facts are that during search and survey proceedings at the premises of the assessee, it was observed that the assessee and its branches were involved in the purchases from non-verifiable parties in cash. All such purchases were made in cash below Rs. 10,000/- in the name of fictitious parties. Statements of Mr. Hardik Doshi, handling the Borivali Branch and Mr. Yogesh Doshi, handling the Walkeshwar branch are also on record. They confirmed that these purchase bills were prepared by them on the instructions and directions of Mr. Sagar Jhaveri and Mr. Yogin Jhaveri of the Head office. The same *modus operandi* concerning sales is also there.

5. The branch and head office-wise cash purchases were there vide para 6.7.8 of the assessment order for the period 01.04.2019 to 16.10.2019 amounting to Rs. 3,90,16,241/-. It is also observed that the total purchases

during the year under consideration were Rs. 305, 57, 22,228/-. The ratio of total purchases vis-à-vis cash purchases under question comes to 1.27%. It is pertinent to mention that the transactions of the purchases were duly reflected in the regular books of accounts and the GST Returns. The revenue is not able to find any deficiency in the books of accounts maintained by the assessee, even though there was a search and seizure operation was carried out in the case of the assessee.

6. The assessee presented complete set of books of accounts along with cash book, stock register, sales register and purchase register. Other than the issues discussed (supra), the revenue is not able to point out any deficiency in the books of the assessee and nothing they found out of books. For better analysis and understanding we deem it fit to reproduce the relevant provisions of section 69C of the Act (Applied in the case of the assessee on cash purchase) as under:

Section - 69C, Income-tax Act, 1961

Unexplained expenditure, etc.

69C. Where in any financial year an assessee has incurred any expenditure and **he offers no explanation about the source of such expenditure or part thereof**, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year :

Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.

Now to be precise, this section deals with the situation, where source of expenditure is under challenge. Throughout the order of the AO, we have not come across where there is an iota of doubt about the source of purchases made by the assessee. All the purchases are accounted in the regular books, the source is obviously explained. The provisions of section 69C of the Act are

not applicable as there was no unaccounted expenditure. It is also an admitted fact that the complete books of accounts were also produced before the AO and the same were examined. No defect was pointed out. Thus, the same stood accepted by the AO, still Ld. CIT (A) sustained an ad-hoc disallowance @ 12.5% on the purchase amount made in cash. Based on above factual and legal analysis, we do not find any perversity in the order of Ld. CIT (A); hence order of Ld. CIT (A) on this issue is not liable for any change. **In the result, Ground No. 1 raised by the Revenue is dismissed.**

7. Ground No. 2 pertains to the deletion of the addition of Rs. 1, 43, 87,808/- and substituted with an application of G.P @ 1.11% amounting to Rs. 1, 59,705/-. On this issue as sales are already reflected in the books of accounts, which were duly examined and accepted by the AO and in addition to that an addition @ 12.5% has already been made on the amount of cash purchase without rejecting books of accounts, we do not see any reason for any further addition. Still, the Ld. CIT (A) has made an ad-hoc addition @ 1.11% on the cash sales of Rs. 1, 43, 87,808/-. In this situation, we do not see any problem in the order of the Ld. CIT (A) and nothing above this can be done. We do not find any force in the contentions of the revenue. **In the result, Ground No. 2 raised by the Revenue is dismissed.**

8. Ground No. 3 pertains to the deletion of the addition of Rs. 16, 36,000/-, i.e. cash found and seized from different premises of the assessee. It is observed that AO himself accepted cash sales being made by the assessee through various locations and is not able to point out any defect in the books of accounts maintained and produced by the assessee; specifically there is no indication in the assessment order about any discrepancy in the cash book. Rather, cash balance as per cash book at H.O. and Branch Office is in line with the cash found at these places and cash seized is duly covered by the cash in

hand shown by the assessee. In the given situation no adverse inference can be drawn against the assessee. Ld. AR of the assessee invited our attention towards retention of cash since the date of search, i.e., 11.10.2019 (Almost 5 Years). No refund of the same has been done despite of favorable order of First Appellate Authority. In view of this, we are not inclined to interfere in the order of Ld. CIT (A) and the revenue is directed to treat the same as advance tax by the assessee and all the provisions relating to advance payment of tax will be applicable here. Based on above, **Ground No. 3 raised by the Revenue is dismissed with additional direction to the AO to treat the same as advance tax by the assessee and all the provisions relating to advance payment of tax will be applicable.**

9. **Ground No. 4 pertains to the deletion of the addition of Rs. 1, 13, 73,590/- and substituted with an addition amounting to Rs. 1, 05,218/- on account of excess silver found.** The assessee was maintaining day to day stock register and that's a very important record, which can't be created immediately, i.e. on the date of search itself. It is observed that the assessee submitted stock register maintained by him as on 11.10.2019. The assessee is dealing with precious metals and stones, diamonds etc. and can't afford non-maintenance of stock register otherwise also.

10. It is observed that discrepancy pointed out by the AO was duly reconciled by the assessee and his accountant except some minor difference. Looking at the size of turnover, and amount of closing stock, discrepancies pointed out by the AO is not that material where one can doubt over the reconciliation process carried out by the assessee. One important point in accounting parlance pertinent to discuss here that ultimately AO accepted the Purchase of the assessee, sale declared by the assessee and there is no discrepancy he pointed out in the books of the assessee than how the issue

relating to closing stock raised by the AO can be sustained and that is to when the assessee is maintaining day to day stock register in quantitative terms. AO can't blow hot and cold simultaneously. So many issues he raised about purchase, sales and stock still not rejecting books of accounts and applying the provisions of section 145 of the Act.

11. We have thoroughly reviewed the orders of authorities below along with the financial of the assessee and quantitative stock summary submitted before us. Considering the record placed before us, we do not see any discrepancy in the order of Ld. CIT (A) and are not inclined to interfere with the same. **In the result, Ground No. 4 raised by the Revenue is dismissed.**

12. **In the result, the appeal filed by the revenue is fully dismissed with additional remarks at para no. 8 of our order.**

C.O. No. 129/M/2023 (Arising out of ITA No. 1497/Mum/2023)

M/s. Ronak Gems Pvt. Ltd.,

311, Mehta Bhawan, Shop No. 5,
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..... Appellant

Vs.

Dy. Commissioner of Income Tax,

Central Circle- 2(4), Room No. 802, 8th Floor,
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..... Respondent

13. This cross-objection (C.O.) by the assessee is filed against the order of the Ld. CIT (A)- 48, Mumbai, dated 09.02.2023 u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2020-21. The assessee has raised the following grounds in their Cross-Objection: -

“REVISED GROUNDS OF CROSS OBJECTION”

ON JURISDICTION:

1.1 *In the facts and circumstances of the case and in law, the Ld. CIT (A) erred in affirming the assessment order passed by the Learned Assessing Officer ["the AO"] u/s. 143(3) r.w.s. 153A of the Income Tax Act, 1961 ["the Act"] without appreciating that the said order is bad in law and void for want of jurisdiction being contrary to the extant law.*

ON MERITS:

2.1 *In the facts and circumstances of the case the Ld. CIT (A) erred in partly confirming the action of the Ld. AO by restricting the disallowance in respect of alleged tainted purchases at an amount of Rs. 48, 77,030/- being 12.5% of the purchases of Rs. 3, 90, 16,241/- made by the Appellant alleged to be bogus by the Ld. AO without appreciating the fact that the purchases were genuine and evidenced by a plethora of documents and evidences.*

2.2 *Without prejudice to the above, in the facts and circumstances of the case and in law, the Ld. AO erred in not applying a fair and reasonable Gross Profit Ratio of 1 to 3% to the said purchases as applicable to the gems and jewellery industry and which has been affirmed even in the instructions issued by the department from time to time in this regard.*

3.1 *In the facts and circumstances of the case and in law, the Ld. CIT (A) erred in not granting the benefit of telescoping in respect of additions pertaining to cash sales and difference in stock and further erred in partly confirming the additions made by the Ld. AO*

ON RATE OF TAX:

4.1 *In the facts and circumstances of the case and in law, the Ld. AO erred in computing the taxable income of the Appellant by invoking the provisions of section 115BBE of the Act without appreciating that the said section is not at all applicable in the present case.*

5. *The Appellant craves leave to add, amend, alter, delete or modify all or any the above grounds at the time of hearing.*

14. Our adjudication order is limited to extent of Ground Nos. 2.1, 2.2, 3.1 and 4.1, as the Ground No. 1.1 not pressed and Ground No. 5 is general in nature. As far as Ground Nos. 2.1 and 2.2 are concerned, are already been discussed and dealt with in the appeal of the Revenue and we don't find any justification in interfering with the order of the Ld. CIT (A). As far as addition sustained w.r.t. cash sales amounting to Rs. 1, 59,705/- and Rs. 1, 05,218/- on

account of difference in stock is concerned, we find force in the arguments of the assessee that benefit of telescoping can be given, as already a G.P. addition of higher percentage @ 12.5% has been made against the cash purchases of the assessee, without rejecting the books of accounts and applying the provisions of section 145 of the Act.

15. Once an addition has been made applying G.P. Rate at a much higher percentage than required on any item of the trading account, further addition in any form on other heads of trading account can't be made. With this discussion and applying the settled position of law on application of G.P. Rate, we direct the AO to delete the addition of Rs. 1,59,705/- and Rs. 1,05,218/- on account of cash sales and difference in stock respectively by giving the benefit of telescoping to the assessee. **In the result, Ground No. 2.1 and 2.2 are dismissed, whereas Ground No. 3.1 is allowed.**

16. Ground No. 4.1 pertains to applicability of section 115BBE of the Act in the case of the assessee. Before us, the limited question is that whether business receipts/business turnover is taxable under section 115BBE of the Act? As per the intention of legislature, the burden to apply section 115BBE and section 68 to section 69D of the Act rests on revenue's shoulder. That burden cannot be discharged on the basis of assumption and presumption made by the assessing officer. Having gone through the section 115BBE, as noted above, we are of the view that business activity related income may not ordinarily get placed u/s. 68 to section 69D of the Act.

17. The provisions of Section 115BE are applicable on the income taxable under section 68, 69, 69A, 69B, 69C or 69D of the Act. The income declared by the assessee is under the head Business and AO also revenue also applied G.P. Rate on the business transactions of the assessee. The assessee is in the business of diamond, precious stones, silver and gold etc. and this fact is not

under challenge that whatever is there with the assessee pertains to its earning out of business. Therefore, since income declared and G.P. addition made are in the nature of business income, the same is not taxable under any of the section referred above and accordingly section 115BBE has no application in case.

18. Once it is accepted by the AO and further confirmed by the Ld. CIT(A) that all the transactions with reference to the assessee are part of business activities, there is no application of sections 68, 69, 69A, 69B, 69C or 69D of the Act and consequently section 115BBE also not applicable. Our view is further strengthened by the following judicial pronouncements of Hon'ble High Courts and coordinate benches as under:

[2024] 161 taxmann.com 44 (Madhya Pradesh) PCIT v. Krishna Kumar Verma

[2024] 160 taxmann.com 239 (Surat-Trib.) ACIT v. Surat Life Care (P.) Ltd.

[2023] 157 taxmann.com 680 (Chennai - Trib.) ITO v. Sahana Jewellery Exports (P.) Ltd.

[2024] 158 taxmann.com 679 (Amritsar - Trib.) Tejpal Singh v. ACIT/DCIT

In view of the facts of the case and settled position of law, respectfully following the judicial pronouncements discussed (supra), we allow the ground taken by the assessee and AO is directed to apply normal rate of tax instead of applying rate as prescribed in section 115BBE of the Act.

In the result, Ground raised by the assessee is allowed.

19. In nutshell, appeal of the revenue is fully dismissed and the C.O. filed by the assessee is partly allowed.

The order was pronounced in the open court on 16th May 2024.

Sd/-

(AMIT SHUKLA)

JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 16/05/2024

Sd/-

(GAGAN GOYAL)

ACCOUNTANT MEMBER

Sr. PS (Dhananjay)

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai