

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH: BANGALORE**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER AND
SHRI SOUNDARARAJAN K, JUDICIAL MEMBER**

ITA No. 1275/Bang/2024
Assessment Year: 2015-16

Smt. Rekha Ganesh, No.22/2-1, Shamanur Kallappa and Sons, Chowkipet, Davangere – 577 001. PAN – AGDPG 8986 E	Vs.	The Asst. Commissioner of Income Tax, Circle – 1(1), Davangere.
APPELLANT		RESPONDENT

Assessee by	:	Shri V Srinivasan, Advocate
Revenue by	:	Shri Subramanian S, JCIT (DR)

Date of hearing	:	10.09.2024
Date of Pronouncement	:	20.09.2024

ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

This is an appeal filed by the assessee against the order passed by the NFAC, Delhi dated 12/06/2024 in DIN No. ITBA/NFAC/S/250/2024-25/1065587710(1) for the assessment year 2015-16.

2. The assessee in ground No. 2 has challenged the validity of the assessment framed u/s 143(3) r.w.s. 147/144A of the Act.

3. Briefly stated facts are that the assessee in the present case is an individual and derived income under the head 'house property' and 'other source'. She is also a partner in the firms namely M/s S.S. Trading Company and M/s Lakshmi Flour Mills. As such, search u/s 132 of the Act was conducted in the case of Nirav Modi Group/Firestar Group/ M/s Firestar Diamond International Pvt Ltd. dated 14/01/2017. In connection with the impugned search, a survey proceeding under section 133A of the Act was carried out on "the Nirav Modi Jewellery Store" at Kala Ghoda, Fort, Mumbai. During the survey, a digital data being excel sheet "4 Sold Jewellery Details of Costing & Selling File 1-April-2016 to 31-March-2017" was found from the laptop in possession of employee of said Jewellery Store namely Shri Saurabh Jitendra Shah who was entrusted with job of maintenance of day-to-day stock lying with store and stock movements details along with maintenance of regular books of accounts of stores. The excel sheet in which sales were recorded contains various information such as salesperson through whom sales was effected, date of sale, customer name, product description, weight, cost of product, sale price, mode of receipt such as cheque/RTGS, credit/debit card, cash A/c and "cash". In connection with impugned excel sheet statement of Shri Saurabh Jitendra Shah in the course of survey proceeding dated 15th January 2017 was recorded under section 131 of the Act. In the statement Shri Jitendra explained that that the impugned sheet represents the detail of all the sales made by "Nirav Modi Jewellery Store" at Mumbai and Delhi. He further explained that the mode of receipt of cash sale in column "Cash A/c" is recorded in regular books of account whereas mode of receipt recorded in column "cash" are made outside regular books of account and such unaccounted cash sales are aggregating to Rs. 28.20 crores during the period April to

November 2016. Further, the statement of salesperson namely Smt. Rehsma Verma who claimed to work at "Nirav Modi Boutique" located at ITTS House, Sri Sai Baba Road, Fort Mumbai also recorded under section 131 of the Act dated 16th January 2017.

3.1 The list of customers to whom such unaccounted cash sales made includes the name of present assessee. As per the impugned excel sheet the appellant assessee has purchased jewellery worth of Rs. 5.73 crores in "cash" on various dates during the period 23rd April 2014 to 23rd November 2014 besides purchase of jewellery worth of Rs. 28 lakhs through Cheque/RTGS. Thereafter the appellant assessee was summoned u/s 131 of the Act wherein her statement on oath u/s section 131(1A) of the Act was recorded in which she denied having made any purchase of jewellery in cash amounting to Rs.5.73 crores from "Nirav Modi Jewellery Store" except the purchase of jewellery worth of Rs. 28 lakhs through the banking channel.

3.2 Based on the above discussed information received from DDIT(Inv.) Mumbai, the AO initiated reopening assessment proceeding under section 147 r.w.s. 148 of the Act vide notice dated 23rd May 2018. The appellant assessee objected to the reopening of the assessment u/s 147 of the Act vide letter dated 18/02/2019, which was overruled by the AO vide order dated 21/03/2019 and 07/05/2019.

4. The AO during the assessment proceedings placed heavy reliance on the excel sheet found from the laptop and statement of employee of the jewellery Store. Accordingly, the AO held that excel sheet in which assessee name was found as purchaser was maintained in a systematic

manner containing the description of jewellery article, name of the client, product type, net weight, cost, sale price, whether by cash, amount of cash received and balance outstanding. The impugned sheet contains both accounted and unaccounted sales made by the Nirav Modi jewellery and further supported by the statement of employee Shri Saurabh Jitendra Shah. Hence the entries made therein are true.

5. The AO also found that the assessee has also purchased jewellery amounting to Rs. 28 lakhs in the year under consideration and jewellery Rs. 30,36,000/- in subsequent year i.e. A.Y. 2017-18 through banking channel, which evidence that the assessee was a regular customer of the impugned Jewellery Store.

6. The AO also observed in the assessment order that the assessee was given an opportunity of cross examination of the employees viz. Shri Saurabh J Shah vide letter dated 07/05/2019 and 22/05/2019 and the same was not availed by the assessee. Besides the above, the AO also referred to the statement of Smt. Reshma Varma, who also acknowledged having made sales through unaccounted cash to various parties. Accordingly, the AO treated the purchase of jewellery as per the excel sheet amounting to Rs.5.73 crores as unexplained income of the assessee u/s 69A of the Act and added to the total income of the assessee.

7. Aggrieved, assessee preferred an appeal to the Id. CIT(A).

8. The assessee before the Id. CIT(A) submitted that the proceedings u/s 147 of the Act were initiated merely based on the excel

sheet received from the investigation wing along with the statement of 2 employees of Nirav Modi Jewellery Store Mumbai, wherein it was alleged that the assessee has purchased jewellery in cash from the unaccounted sources. As such, the investigation wing has not forwarded any seized material to the AO, which was also acknowledged by the AO in his letter dated 07/05/2019. Thus, according to the assessee, the reopening was done merely on the basis of the information received from the investigation wing, which represents the borrowed satisfaction of the AO whereas it is mandatory that there should be independent formation of prima facie belief of the AO that the income of the assessee has escaped assessment under the provisions of sec. 147 of the Act. Thus, as per the assessee, the reopening cannot be done based on suspicion and accordingly, the proceedings u/s 147 of the Act need to be quashed.

9. Furthermore, there was no opportunity given to the assessee for cross examination of the persons on whose statement, the proceedings u/s 147 of the Act were initiated. The assessee has made submission during the assessment proceedings for cross verification of the statement based on which, the proceedings were initiated u/s 147 of the Act. But the AO without following the process of granting an opportunity of cross examination has just mentioned in his letter dated 22/05/2019 that the opportunity of cross examination may be availed before him/AO on or before 31/05/2019.

10. The assessee also submitted that search proceeding under section 132 of the Act dated 27th June 2016 was carried on her family wherein the investigating authority thoroughly verified the jewellery declared by her family in wealth tax/ income tax return viz-a-viz physical jewellery.

As a result of such verification and enquiry during the search, nothing was found of an incriminating nature, or any variance found in relating to jewellery held and declared by her family. In view of the above, the assessee contended that the proceedings u/s 147 of the Act are not sustainable.

10.1 The assessee on merit also submitted that she has not purchased any unaccounted jewellery in cash except the jewellery of Rs. 28 lakhs through a banking channel. However, the Id. CIT(A) disagreed with the contention of the assessee on the reasoning that there were documents found as a result of search & survey u/s 132 & 133A of the Act at the premises of Jewellery store, wherein the name of the assessee was very much appearing for the purchase of jewellery in cash worth of Rs. 5.73 crores, which was not reflected in the balance sheet of the assessee. The excel sheet was also supported by the statement of employees of the search party. It was onus upon the assessee to explain the source of cash used for the purpose of purchase of jewellery based on the documentary evidence, but the same has not been explained. Therefore, the AO has rightly made the addition to the total income of the assessee.

11. Regarding the opportunity of cross examination, the Id. CIT(A) observed that the addition in the hands of the assessee was not merely based on the statement of 3rd parties, but it was based on the material being excel data recovered as a result of search, therefore, it was not mandatory to provide the opportunity of cross examination of the person whose statements were recorded. Without prejudice to the above, the Id. CIT(A) has also observed that the AO has given categorical finding

that the assessee was offered the opportunity of cross examination during the assessment proceedings, which were not availed by the assessee. Accordingly, the Id. CIT(A) was of the view that there was no violation of the principle of natural justice for not extending the opportunity of cross examination to the assessee. Thus, the Id. CIT(A) upheld the finding of the AO.

12. Being aggrieved by the order of the Id. CIT(A), the assessee is in appeal before us.

13. The Id. AR before us filed a paper book running from pages 1 to 388 contended that the reopening was done based on the borrowed satisfaction on the information received from the investigation wing and without independent application of mind of the AO.

14. Likewise, the Id. AR further submitted that the proceedings were initiated based on the excel data found from the 3rd party premises and, therefore, the proceedings u/s 153C of the Act should have been initiated instead of initiating the proceedings u/s 147 of the Act.

15. The Id. AR further submitted that data found from third party cannot be basis for making the addition in the hands of the assessee. It is because the excel sheet found during the search/survey at third party premises per se does not refer to any income of the assessee from undisclosed sources. At the most, the material can trigger the investigation to dig out more corroborative material before alleging that the assessee has made unaccounted purchase from the party. It was also pointed out by the Id. AR that the assessee time and again sought

an opportunity of cross examination which has not been proved by the AO.

16. On the other hand, the Id. DR vehemently supported the orders of the authorities below.

17. We have heard the rival contentions of both the parties and perused the material available on record. The first controversy that arises for our adjudication is whether the initiation of proceedings u/s 147 of the Act based on the information received from the investigation wing represents the borrowed satisfaction in the given facts and circumstances. In this regard, we have perused the reasons to believe recorded by the AO for reopening assessment which is placed at page 10 of the paper book and we note that the AO upon receiving the information from the investigation wing regarding purchase of jewellery in cash by the assessee has cross verified the same from the balance sheet of the assessee as on 31/03/2016 and found that such alleged amount of unaccounted purchase of jewellery was not appearing in the balance sheet. This fact is very much evident from the reasons recorded placed on page 10 of the paper book. Accordingly, we note that the AO has not merely acted upon the information received from the investigation wing but also has reconciled the same with the balance sheet of the assessee, which suggests the due application of mind by the AO on his part. Thus, in our considered view it cannot be said that the reopening was done merely based on the information received from the investigation wing. Further, it is important to note that at the time of initiation of proceedings u/s 147 of the Act, the AO has to draw prime facie believe that the income of the assessee has escaped assessment,

and he is not expected to dig out the absolute facts about the escapement of income. In this regard we also draw support and guidance from the judgment of the Hon'ble Gujarat High Court in the case of Amar Jewellers Ltd vs. ACIT reported in 444 ITR 148, where in it was held as under:

*18. Having regard to the materials on record it cannot be said that there is a total non-application of mind on the part of the Assessing Officer while recording the reasons for reopening of the assessment. It also cannot be said that his conclusion was merely based on the observations and information received from the Investigation Wing. The Assessing Officer could be said to have applied his mind to the same. The Assessing Officer could not be said to have merely concluded without verifying the facts that it is the case of reopening of the assessment. We do not find merit in the vociferous submission of the learned counsel appearing for the writ applicant that the contents of the reasons recorded by the Assessing Officer for the reopening of the assessment is merely an introduction about the investigations conducted by the Investigation Wing, the modus operandi of the entry provided, the summing up of inquiry of the Investigation Wing, the information received from the Investigation Wing etc. We have examined the belief of the Assessing Officer to a limited extent to look into whether there was sufficient material available on record for **the Assessing Officer to form a reasonable belief and whether there was a live link existing of the material and the income chargeable to tax that escaped assessment. The case on hand is not one where it could be argued that the Assessing Officer, on absolutely vague or unspecific information, initiated the proceedings of reassessment without taking the pains to form his own belief in respect of such materials.***

17.1 In view of the above, we disagree with the contention of the Id. AR of the assessee and hold that there was due application of mind of the AO while initiating the proceedings u/s 147 of the Act.

18. The 2nd controversy arises whether the proceedings u/s 153C of the Act should have been initiated instead of 147 of the Act in the given facts and circumstances. In this regard, we note that for initiating the proceedings u/s 153C of the Act, first it is mandatory that the AO of search person has to record satisfaction that the material found during the search belong to/pertain to a person other than search person and

forwards such material to the AO having jurisdiction over such other person. However, we find that in case of present assessee the material being excel sheet referred was found during survey proceeding carried at jewellery store and not in the search proceeding. Further, it is equally important to note that AO of Firestar Group, which is the search party, has not recorded any satisfaction that the material found during the search belongs to or pertains to the present assessee. As such, the investigation wing has directly conveyed information to the AO of the assessee about the jewellery purchased by the assessee in cash. Thus, on the basis of the above fact the requirement for initiating the proceedings under the provisions of sec. 153C of the Act, has not been complied with. Accordingly, we are of the view that the AO rightly proceeded to initiate reopening assessment u/s 147 of the Act in the given facts and circumstances. In holding so we draw support and guidance from the judgment of The Hon'ble Madras High Court in the case of Saloni Prakash Kumar vs. ITO reported in 155 taxmann.com 432 wherein it was held as under:

20. Section 153C of the IT Act is only an enabling provision to issue a notice notwithstanding anything contained in sections 139, 147, 148 etc of the IT Act. However, it does not preclude the Department from issuing notice for reopening the assessment under Section 148A(b) of the IT Act for the purpose of section 148 of the IT Act to complete the assessment under section 147 of the IT Act.

18.1 In view of the above, we do not find any infirmity in the order of the authorities below for initiating the proceedings u/s 147 of the Act. Accordingly, we reject the contention of the Id. AR for the assessee.

19. Coming to the merit of the case, undeniably there was certain excel sheet containing details of alleged accounted and unaccounted sales in cash made by the Nirav Modi Jewellery store Mumbai was found

during the search/survey wherein the name of the assessee was appearing against the sales in cash worth of Rs. 5.73 crores. The question arises whether such excel sheet can be a base for making the addition in the hands of the assessee. In this regard, it is to be noted that impugned excel sheet was written and maintained by third party found from the premises and possession of third party. It may be true that such third party (in this case Nirav Modi Jewellery Store) indulge into activity of unaccounted sales, but such facts cannot ipso-facto give right to revenue to make addition in the hand of the assessee merely for the reason that her name appearing in the document written or maintained by other parties. As such it is incumbent upon the revenue to bring independent corroborative material suggesting that the assessee has actually made cash purchases of jewellery which is unaccounted and unexplained. In this regard, we feel pertinent to refer the judgment of Hon'ble Supreme Court in the case of CBI vs VC Shukla reported in 1998 taxmann.com 2155 and in case of Common Cause (A registered Society) vs. Union of India reported in [2107] 77 taxmann.com 245 (SC). The relevant observation of Hon'ble Supreme Court in the case of Common Cause (supra) is extracted as under:

There has to be some relevant and admissible evidence and some cogent reason, which is prima facie reliable and that too, supported by some other circumstances pointing out that the particular third person against whom the allegations have been levelled was in fact involved in the matter or he has done some act during that period, which may have co-relations with the random entries.

19.1 In the case of present assessee there is no evidence or material suggesting that the assessee made unaccounted investment in gold/diamond jewellery except "excel sheet" found from Jewellery store wherein her name is appearing as customer. The revenue authority without conducting necessary inquiry and bringing clinching material

merely placed heavy reliance on the material found from third party and their statement. As such the revenue authority lost sight to the fact that search proceeding under section 132 of the Act was also carried at the assessee family dated 27-06-2016 even before the search/survey carried at the impugned jewellery store dated 14-1-2017 and nothing incriminating was found in relation to the investment made in jewellery by the assessee and her family as alleged by the Revenue. If assessee has made such unaccounted investment in jewellery as alleged by the revenue authority, then there should have been found something during the search carried out at the assessee's family.

19.2 Likewise, in the present case, the AO has referred the statement recorded by the employees viz. Shri Saurabh J Shah and Smt. Reshmi verma after ignoring the statement furnished by the assessee herself u/s 131 of the Act that she has not purchased any jewellery as discussed above. In this connection, firstly we note that those employees nowhere specifically taken the name of the assessee as purchaser of Jewellery in cash as such they only explain the modus operandi of unaccounted cash sale made by the impugned jewellery store based on data maintained in the seized excel sheet. In such a situation, the difficulty arises on whose statement the reliance has to be placed because both the parties in their respective statements have given different allegation, so in such a situation, we are of the view that an opportunity of cross examination becomes essential since the AO is placing the reliance on the statement of 3rd parties for making the addition in the hands of the assessee. Therefore, 3rd parties become the witness of the Department and accordingly, it is the duty of the Department to call both the parties for cross verification but the same has not been done by the AO in the given

facts and circumstances. As such the AO only stated that the assessee may avail the opportunity of cross examination before him on or before 31st May 2019 without fixing any date of cross examination on which day the assessee and the witness may present personally for such cross examination. Therefore, in our considered opinion, non-granting any opportunity of cross examination in the given set of facts violates the principle of natural which vitiates the validity of addition. In holding so we draw support and guidance from the judgment of the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. Commissioner of Excise reported in 62 taxmann.com 3 where it has been held as under:

"7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price-list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price-list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show-Cause Notice.

9. We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal. No costs."

19.3 It is also important to note that the excel sheet relied by the revenue for making the impugned addition pertains to the period beginning from April 2016 to 31 March 2017 whereas the revenue has

made the addition on account of unexplained purchases in the hands of the assessee in the FY 2014-15 corresponding to assessment year 2015-16. This fact can be verified from the statement given by Shri Saurabh Jithender Shah in response to question No. 14 and 19 which are extracted as under:

"Q.14 During the course of survey proceedings, your laptop was subject to verification and it was found that there is an excel file name "4-Sold Jewelry Details of Costing & Selling File 1-April-2016 to 31-Mar-2017.xls" in the folder named "new folder" in F Drive. Please explain the contents of the said file.

Ans. The said file has details of all sale's made by Nirav .Modi Jeweellaxy Store both at Mumbai and Delhi from April 2016W. November 2016 in the sheet/ tab named "summary". The said sheet contains columns as details of jewellery, the customer to whom the jewellery is sold, date of sale, mode of payment, etc. The other sheets have details of costing."

XX

Q j.9 1 Please state as to what is the total quantum of cash. unaccounted in the sales of Jetvellary at Muzabai and .Delhi store.

Ans. As per the details of sales maintained by me in the excel file named "4-Sold Jewelry Details of Costing & Setting File 1-April-20 16 to 31-Mar-2017.xls" in the folder named 'new folder- in F' Drive of my laptop, the total cash unaccounted received on the sale of jewellery is Rs.28,20,14,275/- for the period 1st April 2016 to 30th November 2016."

19.4 From the above, it is transpired that the excel sheet, which has been heavily relied by the revenue, does not pertain to the period in dispute and therefore in our considered view the same cannot be used against the assessee for the year under consideration.

19.5 In view of the above and after considering the facts and circumstances in totality, we hold that no addition u/s 69A on account of alleged purchase of jewellery amounting to Rs. 5.73 crores is warranted in the hands of the assessee in the given set of facts. Accordingly, we

set aside the finding of the Id. CIT(A) and direct the AO to delete the addition made by him. Hence, grounds of appeal raised by the assessee is hereby partly allowed.

20. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in court on 20th day of September, 2024

Sd/-

(SOUNDARARAJAN K)
Judicial Member

Sd/-

(WASEEM AHMED)
Accountant Member

Bangalore,
Dated, 20th September, 2024

vms

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore