

IN THE INCOME-TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI
BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
&
SHRI PRABHASH SHANKAR, ACCOUNTANT MEMBER

ITA No.6799/MUM/2024
(A.Y. 2009-10)
ITA No.6800/MUM/2024
(A.Y. 2011-12)

Perry Impex, Mumbai, C/o Himanshu Gandhi, 16th Floor, D Wing, Trade World, Kamala Mills Compound, SenapatiBapat Marg, Lower Parel, Mumbai - 400 013, Maharashtra	v/s. बनाम	Deputy Commissioner of Income Tax, Circle 19(1), Piramal Chambers, Dr. SS Rao Marg, Parel, Mumbai - 400 012, Maharashtra
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AACFP7866R		
Appellant/अपीलार्थी	..	Respondent/प्रतिवादी

ITA No.6983/MUM/2024
(A.Y. 2011-12)
ITA No.6984/MUM/2024
(A.Y. 2009-10)

Assistant Commissioner of Income Tax, Circle 19(1), Piramal Chambers, Dr. SS Rao Marg, Parel, Mumbai - 400 012, Maharashtra	v/s. बनाम	Perry Impex, Mumbai, C/o Himanshu Gandhi, 16th Floor, D Wing, Trade World, Kamala Mills Compound, SenapatiBapat Marg, Lower Parel, Mumbai - 400 013, Maharashtra
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AACFP7866R		
Appellant/अपीलार्थी	..	Respondent/प्रतिवादी

Appellant by :	Shri Himanshu Gandhi,AR
Respondent by :	Shri Mahesh Pamnani(Sr. DR)

Date of Hearing	24.02.2025
Date of Pronouncement	27.02.2025

आदेश / O R D E R

PER BENCH :-

The above captioned appeals have been filed by the assessee and cross appeals by the Revenue against the orders of even date passed by the Learned Commissioner of Income-tax (Appeals)/ADDL/JCIT (A) Madurai



[hereinafter referred to as “CIT(A)”] pertaining to the order u/s. 143(3) r.w.s. 147 of the Income-tax Act, 1961 [hereinafter referred to as “Act”] for the Assessment Years [A.Y.] 2009-10 and 2011-12. Since the issues are common and interlinked with minor figurative differences only, these appeals are being taken up together for adjudication vide this composite order for the sake of brevity. Assessee’s grounds are being adjudicated first as below:

ITA No.6799/Mum/2024 for AY 2009-10

ITA No. 6800/Mum/2024 for AY 2011-12

2. In the **ground no.1**, the assessee has contended that the Ld. CIT(A) erred in confirming issue of notice under section 148 on non-existent entity and resultant order passed u/s 143(3) r.w.s 147 on non-existent entity i.e. ‘Perry Impex’ is also bad in law and require to be quashed.

3. It is contented that the assessee firm was taken over by M/S Perry Impex P.Ltd from 30.09.2010. Therefore, the notice u/s 148 and also assessment order u/s 143(3) were wrongly issued in the name of the firm which had ceased to exist. The ld.CIT(A) pointed out that it was admitted before him that the assessee never brought the above fact to the knowledge of the AO. On the contrary, it kept submitting details as called for during the entire proceeding. Further, PAN of the assessee remained active despite the assertion that got dissolved and merged with Perry Impex in 2010 itself. Moreover, the ld.AR did not vehemently press the ground before us. In view



of above facts, this ground of appeal being devoid of any merit, is **dismissed**.

4. In the **ground no.2**, the assessee has contested the validity of the reassessment order by claiming that the Ld.CIT(A) erred in confirming reassessment proceeding by issuing notice under section 148 which is bad in law and require to be quashed.

5. The ld.CIT(A) has duly considered the issue and held that there was no merit in the arguments of the AR that the case of the assessee did not fall within the parameters laid down by section 147 r.w.s. 148 of the Act. He observed that the AO had properly followed due procedure prescribed under the law to reopen the case for the year under consideration, after having the reason to believe that the income in this case escaped assessment and considered it to be a case fit for applying the provisions of section 147/148 of the I.T. Act. 1961. From the assessment order, it was observed that the assessee had acknowledged the notice issued by the AO and duly complied with it.

5.1 The ld.AR has also not vehemently argued in support of the ground before us. We find no infirmity in the action of the AO in initiation of proceedings u/s 147 of the Act. The DGIT(Inv), Mumbai had communicated the details of the purchases made from the certain parties



which were considered as bogus purchases. After the receipt of the information, the AO has looked into the assessment record of the assessee and after examination of the same found that the assessee had made purchases from the above parties listed as suspected dealer. The information received from the DGIT(Inv) stood corroborated with the books of accounts which led to the formation of reason to believe that the income of the appellant has escaped assessment. We do not find any infirmity in the conclusion drawn by the Id.CIT(A) and **dismiss the ground.**

6. In the **ground no.3 and 4**,the assessee has agitated the confirmation of 3% disallowance of alleged bogus purchases from hawala parties, by the Id.CIT(A). It is stated that the Ld. CIT(A) erred in confirming disallowance of Rs 5,24,998/-,being 3% of Rs 1,74,99,924/-for AY 2009-10 and Rs. 6,44,517/-,being 3% of suspicious purchases amounting to Rs. 2,14,83,901/-in AY 2011-12,by treating the same as non-genuine. He failed to consider that assessment order was passed without furnishing the material evidence and opportunity of cross examination to it in gross violation of principal of Audi Alteram Partem rendering the order to be bad in law liable to be quashed.

7. Facts of the case are that the assessee is engaged in the business of manufacturing and trading of diamonds. The AO received information



from DGIT(Inv.), Mumbai that a search and survey operation was carried out in the group cases of Shri Bhawarlal Jain group on 03.10.2013 wherein it was found that this group indulged in providing accommodation entries in the nature of bogus sales, unsecured loans etc through its various entries. It was found that the assessee had made following purchase from entities of Shri Bhawarlal Jain and Group, which indulged in providing bogus entities for purchase of diamond to various persons:

Name of the party	AY 2009-10	AY 2011-12	TOTAL
NAZAR IMPEX	1,74,99,924/-	-	1,74,99,924/-
IMPEX GEMS		1,63,37,002/-	
MINAL GEMS	-	51,46,899/-	
TOTAL		2,14,83,901/-	1,74,99,924/-

8. The case was reopened u/s 147 by issue of notice u/s 148 of the Act. After considering the facts of the case, submissions filed by the assessee and details gathered from various enquiries, the AO was of the opinion that the transactions in respect of the material shown as purchases from the abovementioned parties were not genuine transactions. As per the information, the concerned Hawala Dealers had not sold any goods, but had given accommodation entries of sales to the assessee. After making detailed



enquiry, the A.O. found the purchases to be bogus without taking any delivery of goods. Accordingly, he estimated income of Rs 8,74,996/- by adding 5% of Rs 1,74,99,924/- and Rs.10,74,195/- by adding 5% of amount of Rs. 2,14,83,901/- for AY 2009-10 and 2011-12 respectively from hawala operators, being element of profit embedded in the transactions. Being aggrieved by the above addition, it took appeal to the first appellate authority against the applied rate of 5% of aforesaid purchase who reduced the percentage to 3% by relying on certain decisions of High Courts and ITAT. Consequently, the additions were scaled down to Rs 5,24,998/- and Rs 6,44,517/- for AYs 2009-10 and 2011-12 respectively which are being agitated by the assessee before us.

9. Before us, the ld.AR has reiterated the same contentions as made before the ld.CIT(A). However, it is submitted that adoption of 3% is not justified on facts of the case. It is contented that for AY 2009-10, purchases from Nazar Impex were exported on which the assessee earned gross profit of Rs 9,39,953/-, being 5.10% which is similar to other transactions. Therefore, by adoption of 3%, the GP will be 8.10% which is highly impossible. The assessee has also agitated the assessment order stating it be bad in law as no cross examination was allowed.

9.1 In respect of AY 2011-12, it is argued that above purchase from Impex Gems and Minal Gems were exported on which assessee earned GP



of 8.40%. Additional GP of 3% would result in GP of 11.40% which is highly impossible. The assessee has also agitated the assessment order stating it be bad in law as no cross examination was allowed.

9.2 It has also relied on certain decisions of the co-ordinate bench of ITAT, Mumbai in support of the contentions i.e. Murtaza Abdul Gaffar Khan in ITA 2698/Mum/2023, Pamstar Export in ITA 3694/Mum/2024 and Ankit Diamond in ITA NO.3125/3127/Mum/2022.

10. We find that the ld.CIT(A) has discussed in details all the relevant facts of the case and directed the AO to disallow 3% of the purchases under reference of both the assessment years over and above the income returned in place of disallowance of 5% of purchases applied by the AO. This addition is clear of profit disclosed by the appellant during the year. Some important observations and findings are reproduced below:

“4.2.3 It is clear from scrutiny of invoices that though the selling invoice included the complete details of items, but the purchase invoices were very silent on the type of item, only polished & cut diamond was mentioned against the description.....”

The main point derived from the above discussion made about purchase invoices and 4 C's factor of diamond is that no trades were executed between the appellant and the abovementioned parties. If genuine transaction had taken place, the sellers would have been aware of the product being sold to the appellant. But here in the present case, the seller was not even aware of the type, quality, clarity, cut, colour of the diamond and that is the reason they did not mention these price determining factors in the invoices. They simply added carat weight and prices.

4.2.4 In view of the above, the purchase made by the appellant from the alleged Rajendra Jain group cannot be treated as genuine. The A.O. did not doubt the sale component and accepted the sale part of the transaction. On perusal of the sale



invoices and consignment bills, it was found that there are no discrepancies in the sale component. **It is a fact that there will be purchases corresponding to these sales but these purchases were not made from the abovementioned 4 parties. These purchases must have been made from the open market/grey market where trading takes place without issuing bills and by accepting payment in cash. It can be easily concluded that the appellant had made purchases from the open/grey market and accepted the bills from Bhanwarlal Jain Group.**

4.2.5 In this regard, it is apt to refer to certain discussions dealing with similar issue. The decision of Hon'ble Gujarat High Court in the case of **Bholanath Poly Fab Pvt. Ltd. 355 ITR 290 (Guj.)** where the Hon'ble Court was dealing with the finding of Hon'ble ITAT that purchases were made from bogus parties, nevertheless the purchases themselves were not bogus as the entire quantity of opening stock, purchases and sales were tallying and hence, only the profit margin embedded in such amount be subjected to tax. The Hon'ble Gujarat High Court taking cognizance of the fact and held that whether purchases themselves were bogus or whether the parties from whom such purchases made were bogus, is essentially a question of fact and the Tribunal having examined the evidence on record concluded that the assessee did produce cloth and sell finished goods, the entire amount covered under such purchase would not be subjected to tax and only the profit element embedded therein to be taxed.

4.2.6 Coming to the profit element involved in these trades, the Task Force constituted by the Ministry of Commerce and Industry has, after considering BAP (Benign Assessment Procedure) Scheme, recommended a profit margin of 1 to 3% in diamond trading business. Reliance is also placed on the following decisions: 1. Hon'ble ITAT, Mumbai in the case of ITO-25(3)(4) vs. **M/s. Shah Diam (ITA No.4013/Mum/2017)** had decided the identical issue wherein the assessee firm, a Diamond trader had taken similar accommodation entry. The CIT(A) held that only profit element has to be taxed and sustained disallowance of 3% of purchase. The revenue filed appeal before the ITAT which upheld the order of Id.CIT(A). Hon'ble ITAT, Mumbai in the case of **M/s. Naitik Gems vs. ITO Ward 32(2)(4)(ITA No.4760/Mum/2017)** had decided the identical issue wherein accommodation entry from Jain group for diamond purchase was an issue. The Hon'ble ITAT Mumbai 'H' Bench in the case of **M/s. Choron Diamond (I) Pvt. Ltd. vide ITA No.4449/Mum/2016 (A.Y.2007-08), ITA No.6798/Mum/2016 (A.Y.2008-09) and ITA No.6800/Mum/2016 (A.Y.2011-12)** had occasion to deal with an identical issue wherein on the basis of information received from the Investigation Wing of the department that the appellant company has utilized accommodation entry for purchase of diamonds by entities operated and managed by Mr.Bhawarlal Jain, Mr.Rajendra Jain and Mr.Surendra Jain u/s. The Jain Brother has admitted in the statement of oath taken u/s. 132(4) that they have provided accommodation entries for purchase of diamonds.



All the above decisions by the Hon'ble Tribunals including the jurisdictional Tribunal i.e ITAT, Mumbai have dealt with an absolutely identical issue where the issue of accommodation entry for purchase of diamonds from Mr. Bhavarlal Jain, Mr. Rajendra Jain and Mr. Surendra Jain have been the subject matter of appeal. In those cases, the A.O. has treated the diamond trading equivalent to other trading business and had disallowed 12.5% of the suspicious purchases. The CIT(A) and Hon'ble ITAT has considered the very fact that in all other cases where accommodation entries for purchases are taken, the percentage of VAT is as high as 12.5%. On the basis of interpretation by various judgements, 12.5% of VAT rate has been treated as benefit being derived by such beneficial assesseees who have used accommodation entries for purchases. However, in the case of diamond, various Learned Cs.IT as well as the Tribunals have held that VAT in the case of diamond is either 1% or totally exempt. Thus, the percentage of normal business cannot be applied. Thus, it is clear that disallowance of 5% of purchases is not at all justified.

*Though, there are catena of cases including some of them delivered by the jurisdictional ITAT which has decided on this issue, but all of them are not uniform as the cases have been decided as per facts and circumstances of that particular case before them the case of diamond business, the VAT charges are 1% and the custom duty on import is above 2%. Keeping in view the above tax rates, the intention of the appellant to save tax from the transaction should be viewed only to the extent of benefit derived by the appellant from indulging in unethical practice of taking accommodation entries. Also, keeping in view the Board's Instruction No.2/2008 dated 22.02.2008 wherein it has laid down guidelines in the form of benign assessment procedure for assessee's engaged in diamond manufacturing and/or trading and report of Task Force for diamond sector submitted to the Department of commerce wherein it was submitted that net profit in diamond manufacturing is in the range of 1.5% to 4.5 % and in diamond trading, it is in the range of 1% to 3%, it will be fair to estimate the gross profit out of purchases from the dealers which have provided only accommodation entries. **Though the Hon'ble Tribunals including jurisdictional Tribunals have held 2 to 3% as the profit reasonable in diamond trading particularly on purchases for which the accommodation entries have been taken from Bhanwarlal Jain & Others, however, I find it reasonable if 3% of the amount of so-called bogus purchases is brought to tax. I accordingly direct the AO to disallow 3% of the purchases under reference.....over and above the income returned in place of disallowance of 5% of purchases. This addition is clear of profit disclosed by the appellant during the year. Thus, the ground of appeal is partly allowed.***

10. We have duly considered all the relevant facts of the case, do not find any infirmity in the conclusion drawn by the ld.CIT(A) that the impugned transactions are not genuine



purchases rather being accommodation entries only. As regards adoption of 3% of the said transaction over and above the disclosed profit also, we find that the nature of business of the assessee comprises of both manufacturing and trading of diamond. The Id.CIT(A) has adopted 3% for both the years. The report of the Task Force for diamond sector submitted to Department of Commerce suggests that net profit in diamond manufacturing is in the range of 1.5% to 4.5 % and in diamond trading, in the range of 1% to 3%. In catena of orders of jurisdictional Tribunals, it has been consistently restricted the addition to 2% to 3% as the profit embedded in such accommodation entry purchases. **The co-ordinate bench in ITA No. 1551 and 1552/Mum/2020 dated 12.07.2022 in the case of Star Brillian and also in ITA 3125 & 3127/Mum/2022 dated 20.04 2023 in Ankit Diamonds**, in similar cases have considered the profit percentage embedded in the value of disputed purchase @ 2%.

10.1 In view of all relevant facts of the case and also the fact that the assessee is both a manufacturer and trader in diamond business, we are of the considered view that the rate of 2.5% would be justified if the embedded profit in disputed purchases is applied and would meet the ends of justice. Accordingly, the AO is directed to estimate the profit from the non-genuine purchases at the rate 2.5% for both the AYs i.e. 2009-10 and 2011-12 and



restrict the disallowance at this rate and compute the income accordingly.

The above ground are therefore **partly allowed**.

11. In **ground no.5**, it is stated that the Ld.CIT(A) erred in levying penalty u/s 271(1)(c) of Income Tax Act, 1961. This ground is premature as no penalty order was passed in this case. The ground is accordingly **dismissed**.

12. In **the last ground** it is stated that, the Ld. 6 CIT(A) erred in charging interest u/s 234A, 234B & 234C of the Act. This ground being consequential, does not require any adjudication. The AO would consider the provisions, if applicable, while giving effect to the appellate order.

Cross appeals(Revenue)

ITA No.6983/MUM/2024(A.Y. 2011-12)

ITA No.6984/MUM/2024(A.Y. 2009-10)

13. In both the above appeals, the Revenue has contested the conclusion of the Ld.CIT(A) in restricting the addition to 3% of the impugned transactions only in place of 5% applied by the AO.

14. On careful consideration of the facts of the case, we have already concluded and endorsed the findings of the AO and of Ld.CIT(A) that only the profit embedded in the bogus purchases could be added to the income of the assessee and not



the entire purchases since the AO did not find any fault in the disclosed sales figures and the records maintained by the assessee. As far as the rate of 3% applied by the Id.CIT(A) in place of 5% applied by the AO is concerned, we have already dealt with in appeals of the assessee in the preceding **para 10 above** and directed the AO to work out the income at the rate of 2.5% of the non genuine purchases. We, therefore, do not find any merit in the appeals of the Revenue which are accordingly **dismissed**.

15. In the result, the appeals in ITA No.6799 and 6800 of the assessee are partly allowed and Revenue's appeals in ITA No.6983 and 6984 are dismissed.

Order pronounced in the open court on **27/02/2025**.

Sd/-

NARENDER KUMAR CHOUDHRY
(न्यायिक सदस्य/JUDICIAL MEMBER)

Sd/-

PRABHASH SHANKAR
(लेखाकार सदस्य/ACCOUNTANT MEMBER)

Place: मुंबई/Mumbai
दिनांक /Date 27.02.2025
Lubhna Shaikh / Steno

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT



4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

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