

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “J”,MUMBAI
BEFORE SHRI D.KARUNAKARA RAO, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA No.3635/Mum/2015 (Assessment Year- 2010-11)

ITA No. 3636/Mum/2015 (Assessment Year- 2011-12)

ACIT-19(1), 2 nd Floor, Matru Mandir, Tardeo Road, Mumbai-400007.	Vs.	M/s Bhavani Gems DC3100, D Tower, 3 rd Floor, Block G, BKC, Bandra (East) Mumbai-400051 PAN: AAAFB2302G
(Appellant)		(Respondent)

Revenue by : Ms. Beena Santosh (DR)

Assessee by : Shri G. Traishawala (DR)

Date of hearing : 21.02.2017

Date of Pronouncement : 28.02.2017

Order Under Section 254(1) of Income Tax Act

PER PAWAN SINGH, JM:

1. These two appeal u/s 253 of the Income-tax Act ('the Act') by revenue are directed against the order (s) of Ld. Commissioner of Income-tax (Appeals) [for short 'the CIT(A)] –30, Mumbai dated 12.03.2015 for Assessment Year (AY) 2010-11 & 2011-12. In both the appeals the revenue has identical grounds of appeal, facts for both the years are identical, Id CIT(A) also passed common order, thus, both the appeals were heard together and are decided by common order to avoid conflicting decision. For referring the facts, first we are taking Appeal for AY 2010-11. The Revenue has raised the grounds of appeal that Id CIT(A) erred in allowing claim of additional claim of depreciation @ 20% under section 32(1)(ia) of the Act.
2. Brief facts of the case are that the assessee-firm is engaged in the business of manufacturing & exporting/trading in cut and polished diamonds, filed its return of income for relevant AY on 24.09.2011 declaring total income of Rs. 33,49,90,070/-. The assessment u/s 143(3) of the Act was completed on 24.02.2014. The Assessing

Officer (AO) while passing assessment order disallowed the claim of additional depreciation of Rs. 68,28,584/-. Aggrieved by the order of AO, the assessee filed appeal before the Id. CIT(A) wherein the depreciation was allowed. Thus, aggrieved by the order of Id. CIT(A), the Revenue has filed the present appeal before us.

3. We have heard the Id. Departmental Representative (DR) for the Revenue and Id. Authorized Representative (AR) of the assessee and perused the material available on record. At the outset, the Id. AR of the assessee submitted that the grounds of appeal raised by Revenue are covered against the Revenue by decision of Mumbai Tribunal in *Flawless Diamond (I) Ltd.* (2014) 45 Taxmann.com 67 (Mum), *Sheetal Diamonds Ltd.* (ITA Nos. 6687, 6688 & 6689/Mum/2003) dated 23.03.2011 and in *ACIT vs. B.A. Jhaveri* in ITA No 3758/M/2013 dated 30.11.2016. On the other hand the Id DR for the revenue not disputed the contention of the AR for assessee.
4. It was further argued by Id. AR of the assessee that the first year in which the dispute arose was AY 2008-09, as to whether the assessee herein is engaged in the business of manufacturing of cut and polished diamond and is entitle for additional depreciation or not. The assessee approached the Tribunal and the appeal of the assessee was dismissed vide order dated 22.11.2013 relying upon the decision of Hon'ble Supreme Court in *Gems India Manufacturing Co.* reported vide 249 ITR 307. The assessee filed a Miscellaneous Application for rectification of the order in the on the basis of decision of larger bench of Hon'ble Apex Court in *Heaven Diamonds (P.) Ltd. Vs CIT* in Civil Appeal No.9936 of 2011 dated 18.11.2011. The assessee contended in the application that that the assessee was not able to demonstrate the process undertaken by the assessee to convert the raw diamond in the superior commodity is a manufacturing activity. The application of the assessee was dismissed vide order dated 13.05.2015. Against the order of Tribunal dated 13.05.2015, the assessee has further filed appeal before Hon'ble Bombay High Court and the same is still pending.
5. We have considered the rival contention of the parties and find the issue raised in the present appeal is covered against the revenue by the decision of Mumbai Tribunal *Flawless Diamond (I) Ltd* (supra), wherein the coordinate bench held as under:

“18. We have carefully considered the rival submissions. The short controversy before us is as to whether the activity of cutting and polishing of rough diamonds amounts to manufacture or not? At the time of hearing, the learned representative

for the assessee has also furnished an Explanatory Note dealing with the various steps and stages involved in cutting and polishing of rough diamonds into polished diamonds, The Assessing Officer has heavily relied on the judgment of the Hon'ble Supreme Court in the case of Gem India Manufacturing Co. (supra) to emphasise that cutting and polishing of uncut raw diamonds does not amount to manufacture or production of any article or thing. In this context, the following paragraph in the judgment of the Hon'ble Supreme Court 'is relevant:-

"There can be little difficulty in holding that the raw and uncut diamond is subjected to a process of cutting and polishing which yields the polished diamond, but that is no to say that the polished diamond is a new article or thing which is the result of manufacture or production. There is no material on record upon which such a conclusion can be reached."

Quite clearly, the Hon'ble Supreme Court noted that the raw and uncut diamond is subjected to process of cutting and polishing which yields the polished diamond, but it could not go to say that such polished diamond was a new article or thing as a result of manufacture or production because there was "no material on record upon which such a conclusion can be reached". Evidently, the proposition canvassed by the assessee could not succeed before the Hon'ble Supreme Court because it was not able to demonstrate that the process undertaken of cutting and polishing uncut raw diamonds was producing a new article or thing. The aforesaid understanding of the judgment of the Hon'ble Supreme Court is fortified by the subsequent decision of Hon'ble Supreme Court in the case of Heaven Diamonds Pvt. Ltd. in CA No. 9936 of 2010, wherein the following observations have been made :-

"Heard learned counsel on both sides.
Leave granted.

We find from the impugned order of the Income Tax Appellate Tribunal [Tribunal', for short} that there is no discussion on the process undertaken by the assessee, who claims benefit of Section 8018 of the Income Tax Act, 1961 [Act', for short]. The assessee imports raw diamonds and applies thereon the process of Sawing, Turning, Profiling, Cutting, Drilling, Polishing, etc., by the use of sophisticated machineries resulting in production of a superior marketable commodity. Detailed procedure has been set out in the paper book. The Tribunal ought to have examined the process as to whether such process would constitute 'manufacture' under Section 8018 of the Act. That exercise has not been undertaken. The reliance on the judgment of this Court in the case of Commissioner of Income Tax vs. Gem India Manufacturing Company, reported in [2001] 249 I.T.R. 307, may not be correct for the simple reason that, in that case, the Revenue succeeded as Gem India Manufacturing Company was not able to demonstrate the process undertaken by it to convert raw diamonds into a superior commodity. Moreover, the High Court has also not gone into that aspect. The High Court should have remitted the case to the Tribunal to consider whether the process undertaken by constituted 'manufacture'. Under the above circumstances, the impugned orders of the High Court and the Tribunal are set aside and the matter is remitted to the Tribunal for de novo consideration in the light of what we have stated hereinabove.

The civil appeal filed by the assessee is, accordingly, allowed with no order as to costs."

19. In fact, the aforesaid observations of the Hon'ble Supreme Court were before the Tribunal in the case of Heaven Diamonds Pvt. Ltd. in ITA Nos. 2504 & 2817/Mum/2004 dated 22.12.2014, wherein the matter was remanded back to the file of Assessing Officer to examine the process undertaken by the assessee for cutting and polishing of diamonds, as to whether it constituted manufacture for the purposes of Sec. 80IB of the Act. Considered in this light, the decision of the Tribunal in the case of Sheetal Diamonds Ltd. (supra) is quite eloquent wherein the entire process involved in the activity of cutting and polishing of rough diamonds into polished diamonds has been examined and it has been held that it constituted manufacture. The said decision of the Tribunal has been further followed by our coordinate benches in the case of Parmes Diamond Exports Pvt. Ltd. and Flawless Diamonds Pvt. Ltd. (supra). Considered in this light, in our view, the CIT(A) made no mistake in holding that the activity of cutting and polishing of diamonds amounts to manufacture so as to enable the assessee to claim Additional depreciation u/s 32(1)(ia) of the Act. Thus, on this aspect also, Revenue fails.

20. In the result, appeal of the Revenue is dismissed.

6. Considering the above legal position, we do not find any infirmity in the order passed by Id CIT(A) for allowing the additional depreciation to the assessee.
7. In the result, appeal filed by Revenue for both the AY's are dismissed.

Order pronounced in the open court on this 28th February, 2017.

Sd/-

(D.KARUNAKARA RAO)
ACCOUNTANT MEMBER

Mumbai; Dated 28/02/2017

S.K.PS

Sd/-

(PAWAN SINGH)
JUDICIAL MEMBER

Copy of the Order forwarded to :

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

BY ORDER,

(Asstt.Registrar)
ITAT, Mumbai