

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA Nos. 450 & 449/MUM/2023
Assessment Years: 2012-2013 & 2013-14

DCIT-5(3)(1),
Room No. 573, Aayakar
Bhavan, Mumbai-400020.

Appellant

Vs. Silmohan Gems Private Limited,
GE 2011, Bharat Diamond
Bourse Bandra Kurla Complex,
Bandra East-400051.
PAN No. AAECA 6944 Q
Respondent

ITA Nos. 472 & 471/MUM/2023
Assessment Years: 2012-2013 & 2013-14

Silmohan Gems Private Limited,
GE 2011, Bharat Diamond
Bourse Bandra Kurla Complex,
Bandra East-400051.
PAN No. AAECA 6944 Q
Appellant

Vs. DCIT-5(3)(1),
Room No. 573, Aayakar
Bhavan, Mumbai-400020.
Respondent

Assessee by : Ms. Mitali Mehta a/w
Mr. Nareshbhai Shah

Revenue by : Dr. Kishor Dhule, CIT-DR

Date of Hearing : 26/05/2023
Date of pronouncement : 13/06/2023



ORDER

PER OM PRAKASH KANT, AM

These cross appeals by the assessee and Revenue are directed against two separate orders, both dated 20.12.2022 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2012-13 and 2013-14 respectively. The identical grounds have been raised permeating from same set of facts and circumstances, therefore, these appeals were heard together and disposed off by way this consolidated order for convenience and avoid repetition of facts.

2. Firstly, we take up the cross appeal of the assessee and Revenue for assessment year 2012-13. The grounds raised by the assessee and the Revenue are reproduced as under:

Assessee’s Grounds of appeal

1. The learned CIT (A) has erred in law and on facts and in circumstances of the case by partly confirming the disallowance of Rs. 22,63,094/- (Rs. 14, 14,434/- u/s 69C of the Act and Rs. 8,48,660 us 40A(3) of the Act) without considering the submission while the appellant has properly adhered to every notice and directions of Learned AO and has fully co-operated during the whole assessment proceedings.

2. The Learned CIT(A) has erred in law and on facts and in circumstances of the case by confirming the addition made by the AO of Rs. 8,48,660 (being 3 percent of the alleged



unexplained expenditure) u/s. 40A(3) of the Act without giving any opportunity to rebut the evidences.

3. The Learned CIT(A) has erred in law and on facts and in circumstances of the case by confirming the addition made by the AO just on the basis of some action carried out at third party premises without putting on record any other evidences to prove that the purchases are bogus, nor even any opportunity was given to the appellant to rebut the evidences AO might have

4. The learned CIT(A) has erred in law and on facts of the case by partly confirming the disallowance made by A by failing to appreciate the documentary evidences furnished by the Appellant to corroborate the genuineness of such purchases.

5. The learned CIT(A) has erred in law and on facts in making addition to the tune of 5% of the alleged bogus purchases without providing any justification for arriving at this rate which is totally baseless and unacceptable.

6. The learned CIT(A) has erred in law and on facts and in circumstances of the case by partly confirming the addition made by AO without providing opportunity of virtual hearing to the appellant despite of being specifically asked in the submission filed before CIT(A).

7. The learned CIT(A) has erred in law and on facts in confirming the action of AO in levying interests u/s 234A/ 234B/ 234C of the Act.

8. Both the lower authorities have passed the order without appreciating the facts and they have further erred in grossly ignoring various submissions. This action of lower authorities is clear breach of law and principle of natural justice. Therefore, deserve to be quashed.

Revenue's Grounds of appeal

1. "On the facts and circumstances of the case and in law, the Ld.



CIT(A)/NFAC erred in restricting the addition @ 5% of purchase amount of Rs. 2,82,88,673/- at Rs. 14,14,434/- instead of 100% on account of unexplained bogus purchase without appreciating the fact that the assessee has not provided any documentary evidence of Purchase Order, quotation, enquiry form or delivery challan except purchase invoice."

2. "On the facts and circumstances of the case and in law, Ld. CIT(A)/NFAC erred in considering the submission made by assessee and failed to appreciate that unexplained expenditure made by assessee attract provision of section 69C of the Act and for which no evidence has been furnished to the contrary in the support of the claim of the assessee during the course of assessment proceedings."

3. Briefly stated, facts of the case are that the assessee was stated to be engaged in the business of trading and manufacturing of diamond. For the year under consideration, the assessee filed return of income on 25.09.2012, declaring total income at Rs.32,60,698/- under the regular provisions and book profit u/s 115JB of the Income-tax Act, 1961 (in short 'the Act') at Rs.32,14,732/-. Subsequently, on receipt of information from the Investigation Wing of the Income-tax Department that assessee obtained accommodation entry of bogus purchases from some of the entities controlled by 'Shri Bhanwarlal Jain' who during the course of search at his premises, admitted to have engaged in issuing bogus bills. The Assessing Officer recorded reasons to believe that income escaped assessment and issued notice u/s 148 of the Act and commenced reassessment proceedings u/s 147 of the Act accordingly. The Assessing Officer in the assessment order dated 11.03.2016 passed u/s 147 of the Act estimated 3% of the



invoice amount of said purchase made from M/s Millennium Stars amounting to Rs.2,82,88,673/-, which was computed at Rs.8,48,660/- and added accordingly.

3.1 Subsequently, the Ld. Commissioner of Income-tax-5, Mumbai (in short 'the CIT') called for the assessment records and after examination and providing opportunity of being heard to the assessee, passed order u/s 263 of the Act dated 26.03.2018, holding that the assessment order passed by the Assessing Officer u/s 147 of the Act dated 11.03.2016 was erroneous and prejudicial to the interest of the Revenue and directed the Assessing Officer on two grounds. **Firstly**, to make fresh inquiries and then on the basis of the inquiries and material covered decide the issue of addition for whole of the bogus purchase. **Secondly**, directed the Assessing Officer to look into the angle of the commission paid by the assessee for procuring bogus accommodation entries and examine whether section 40A(3) of the Act is attracted. The Ld. CIT also directed the Assessing Officer to decide the issue of bogus purchase in the light of the decision of the Hon'ble Supreme Court of N.K. Proteins Ltd. (supra).

3.2 Pursuant to the direction of the Ld. CIT, the Assessing Officer issued notice u/s 133(6) of the Act to the party M/s Millennium Stars. The said party complied and filed certain details before the Assessing Officer. Thereafter, the Assessing Officer issued summons u/s 131 of the Act to the assessee as well as to M/s Millennium



Stars. Though the assessee appeared, however, the said party Millennium Stars did not appear before the Assessing Officer. The Assessing Officer after considering the material available before him made the addition for the entire amount of bogus purchases and further commission @ 3% for violation of the provisions of section 40A(3) of the Act. The relevant finding of the Assessing Officer is reproduced as under:

7.1 From the assessee's statement and submissions it is evident that they do not know the above party directly and have just dealt with them once. They have no information whatsoever about these party since then. This proves that the assessee has availed the services of the bogus entities to get accommodation entry of bogus purchases so as to suppress the profit shown for the year under consideration. Such bogus entry providers and bogus purchase providers charge a 3% commission from the party seeking such entries. This has been admitted by Shri Bhanwärlal Jain in the statement which was recorded on oath during the search proceedings. Thus, the provisions of section 40(3) are attracted. Considering the fact that the expense incurred is in cash, provisions of section 40A(3) is attracted.

Therefore, the cash commission paid @ 3% of the purchases is also added back to the total income of the assessee.

Penalty proceedings us.274 r.w.s.271(1)c) of the Act are initiated separately for furnishing inaccurate particulars of income.

8. Also as per the decision pronounced by the apex court in the case of N.K. Proteins Limited, it has been held that if the transaction is found to be bogus, then the entire amount needs to be added back as unexplained and not just the profit portion or margin. In the above given case based on the enquiries and all the documents on record, it is proved that the assessee has taken bogus purchase entries to suppress its profit for the given year.



4. On further appeal, the Ld. CIT(A) restricted the disallowance of bogus purchases @ 5 % of the purchase value of Rs.2,82,88,673/- which is computed to Rs.14,14,434/-. As far as the issue of disallowance u/s 40A(3) of the Act is concerned, same has been sustained by the Ld. CIT(A).

5. Aggrieved, both the assessee and the Revenue are before the Tribunal by way of raising grounds reproduced above. In the grounds raised by the assessee, the assessee is aggrieved on two issues **firstly** sustaining the disallowance @ 5% on the bogus purchases, **secondly**, aggrieved for sustaining the disallowance of Rs.8,48,660/- in terms of section 40A(3) of the Act. The Revenue on the other hand is aggrieved by reducing the addition of bogus purchase to the extent of 5% of the purchases amount rather than the entire purchase amount addition which was made by the Assessing Officer. Since, the grounds of the assessee and Revenue on the issue of the purchase of the bogus purchases are interconnected, therefore we are taking up both these grounds together for adjudication.

6. The facts qua the issue of bogus purchase is concerned, the assessee in its books of account shown purchase of Rs.2,82,88,673/- from M/s Millennium Stars. Subsequent to the search action at the premises of 'Shri Banwarlal Jain' it was noticed that he was engaged in providing accommodation entry through concerns controlled by him. One of such concern M/s Millennium



Stars gave an entry of sale of rough diamonds to the assessee. In view of the statement of Shri Bhanwarlal Jain, investigation wing of the Income-tax Department intimated regarding bogus nature of the said transaction of the purchase recorded by the assessee. Identical transaction in the name of another entity M/s Mahalaxmi Gems has been observed in assessment year 2013-14 by the investigation wing of income-tax department. The Assessing Officer in the impugned assessment order held the entire amount of purchase from said party M/s Millennium Stars as unexplained. Whereas, the Ld. CIT(A) has restricted the disallowance to 5% of the purchase amount, observing as under:

“4.3 The assessee has rightly placed the reference of Hon'ble jurisdictional/Tribunal cases mentioned above in SI. No. 3 & 4, which are squarely covered to the instant case. Respectfully following the principle of binding precedence and rule of consistency, it is appropriate to restrict the addition @ 5% of the purchase amount of Rs.282,88,673/- which comes to Rs. 14, 14,434/-. The balance addition made us.69C stands deleted. The ground raised on this issue is partly allowed.”

7. Before us, the Ld. Counsel of the assessee submitted that the assessee has genuinely purchased goods from M/s Millennium Stars and entered into the stock register. She referred to the pages 11 to 27 of the Paper Book, which are copies of the stock register, purchase bills, jo work issued for manufacturing, receipt of finished goods etc. The Ld. Counsel submitted that as per bill dated 15.11.2013, lots of rough diamonds weighing 145.72 Carats, 394.22 Carats and 555.51 carats were purchased from M/s



Millennium Stars and same were further issued on 23.12.2011 (145.72 carats) ; 18.01.2012 (394.22 carats) to M/s Jyo Gems for manufacturing of polished diamonds. Another lot of 555.51 carats was issued to M/s Jogani Diamonds on 20.01.2012. The Ld. Counsel further referred that after receipt of the finished/polished diamonds, same were sold as per the stock register of the polished diamonds, a copy of which is available from page 28 to 29 of the Paper Book. The assessee demonstrated that majority of sales have been exported and therefore, the sales corresponding to the purchases of 'Millennium Stars' have not been doubted by the Department. Therefore, no addition should have been made.

8. The Ld. Departmental Representative (DR) on the other hand submitted that assessee failed to produce said party before the Assessing Officer for verification of the purchase from said party. The Ld. DR further submitted that the assessee even could not give whereabouts of the said party and therefore, disallowance @ 100% of the purchase amount should have been made by the Ld. CIT(A) as against disallowance restricted at the rate of 5% of the purchase amount.

9. We have heard rival submissions of the parties on the issue in dispute and perused the relevant material on record. It is primary onus of the assessee to substantiate the purchases from the said party. However, the assessee failed in producing said party and substantiate purchase, but the corresponding goods are reflecting



in stock register. Before us, the assessee has demonstrated that goods corresponding to the purchase were entered into the stock register and put to manufacturing, and thereafter have been partly exported and partly sold locally. Thus, sales are not doubtful in the case of the assessee. In the circumstances, only presumption is that assessee must have purchased goods from someone else, whereas taken only accommodation bill from M/s Millennium Stars. In the similar circumstances, the Hon'ble Jurisdictional High Court in judgement dated 11/02/2019 in the case of **PCIT Vs Mohommad Haji Adam & Co. (Bombay High Court) Appeal Number: Income Tax AppealNo.1004 of 2016**, observed as under:

“8 In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of N.K. Industries Ltd. (supra) cannot be applied without reference to the facts. In fact in paragraph 8 of the same Judgment the Court held and observed as under-



“So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6 % gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66 %. Therefore, considering 5.66 % of Rs.3,70,78,125/- which comes to Rs.20,98,621.88 we think it fit to direct the revenue to add Rs.20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue.”

9.1 Thus, the Hon'ble High Court held it appropriate to make addition for the benefit assessee has obtained by way of making purchases in cash from the market and for which a reasonable amount of addition could have been made. In the case of the assessee also the Ld. CIT(A) has made addition on the reasonable estimate basis @ 5 % of bogus purchase, which in our opinion is justified. The ratio in the case of N.K. Proteins Ltd.(supra) is not applicable in the case of the assessee as assessee has produced the stock registers to substantiate that amount of goods corresponding to the bills were duly entered in the stock register and after manufacturing same have been sold. In our opinion, the finding of the Ld. CIT(A) on the issue in dispute is justified and we accordingly uphold the same. The grounds No. 1 and 2 of the appeal of the Revenue are accordingly dismissed. The grounds of the assessee



related to the issue of the bogus purchases are also dismissed accordingly.

10. The grounds raised by the assessee are also in relation to the disallowance of Rs.8,48,660/- made by the Assessing Officer for alleged cash commission u/s 40A(3) of the Act.

11. It is the contention of the Assessing Officer that such bogus accommodation entry has been obtained by the assessee against a payment of 3% commission, which fact has been admitted by Shri Bhanwarlal Jain and his statement is recorded on oath. Accordingly, the Assessing Officer made addition for violation of the provisions of section 40A(3) of the Act for making payment in cash more than the prescribed limit. The Ld. CIT(A) also upheld the disallowance observing as under:

“5. The next contention is disallowance of cash commission u/s.40A(3) of Rs.848660/-. In the assessment order, it is mentioned that it was admitted by ShriBhanwarlal Jain in the statement recorded during the search proceedings that bogus purchase providers charge a commission @ 3% from the party seeking such entries. Considering the fact that the expense incurred in cash, the assessing officer has added back the commission @ 3% of purchases. In the present case, the order of the assessing officer by observing that the payment in cash exceeding the limit specified us.40A(3) of the Act, can only be allowed if the assessee could establish the unavoidable circumstances necessitating the payments in cash. However, nothing has been done by the assessee to prove that there were practical difficulties and unavoidable circumstance under which the payments were made in cash and covered under Rule 6DD. The appellant in the present case has not discharged the primary onus cast upon it to substantiate the claim. The natural presumption as per



Indian Evidence Act thus goes against the appellant. In view of the above, the undersigned is unable to persuade self to interfere with the A's decision with respect to the addition on merits as well. Thus, the grounds for the appellant fail.”

12. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that under the provisions of section 40A(3) of the Act, disallowance for payment of expenses in cash exceeding prescribed limit can be made, when the expenses are entered into the books of accounts of the assessee. Whereas in the instant case, there is no such entry for claim of the expenses @ 3% for commission in relation to accommodation entries in books of account. In absence of any claim of expenditure under books of accounts, no disallowance u/s 40A(3) of the Act is warranted. Another issue is that when the Assessing Officer has not treated the expenditure of commission payment for obtaining accommodation entry as unexplained u/s 69C of the Act, the consequent addition u/s 40A(3) of the Act made by the Assessing Officer is also unjustified. In the circumstances, we set aside the finding of the Ld. CIT(A) on the issue in dispute and addition made by the Assessing Officer is accordingly deleted.

13. The grounds raised in cross appeals by the assessee and Revenue for assessment year 2013-14 are identical and therefore, following our finding in cross appeals for assessment year 2012-13. The grounds in assessment year 2013-14 are decided mutatis mutandis.



13. In the result, the appeals of the assessee are allowed partly whereas appeals of the Revenue are dismissed.

Order pronounced in the open Court on 13/06/2023.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;

Dated: 13/06/2023

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai