IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

BEFORE SHRI. OM PRAKASH KANT, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA No.4720/Mum/2024
(Assessment Year: 2014-15)

Sunjewels Private Limited 116, SDF-IV, SEEPZ, Andheri East, Mumbai – 400096.	Vs.	**Dy. Commissioner of Income Tax – 3(2)(1), Mumbai** Room No. 608, 6th Floor, Aaykar Bhavan, M. K. Road, New Marine Lines, Mumbai – 400020.
PAN/GIR No. AABCE3519L		
(**Appellant**)	:	(**Respondent**)

ITA No. 5244/Mum/2024
(Assessment Year: 2014-15)

Dy. Commissioner of Income Tax – 3(2)(1), Mumbai Room No. 608, 6th Floor, Aaykar Bhavan, M. K. Road, New Marine Lines, Mumbai – 400020.	Vs.	**Sunjewels Private Limited** 116, SDF-IV, SEEPZ, Andheri East, Mumbai – 400096.
PAN/GIR No. AABCE3519L		
(**Appellant**)	:	(**Respondent**)

Assessee by	:	Shri. Ravikanth Pathak
Respondent by	:	Shri. Prashant Barote, Sr. DR

Date of Hearing	:	13.02.2025
Date of Pronouncement	:	09.05.2025

O R D E R

Per Kavitha Rajagopal, J M:

These are cross appeals filed by the assessee and the revenue challenging the order of the learned Commissioner of Income Tax (Appeals), Delhi ('ld. CIT(A)' for

short), National Faceless Appeal Centre ('NFAC' for short) passed u/s. 250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2015-16.

2. As the facts are identical, we hereby pass a consolidated order by taking ITA No. 4720/Mum/2024 as a lead case.

3. The assessee has challenged the ld. CIT(A)'s order in not allowing set off of Rs. 2,52,04,161/- being brought forward business loss and unabsorbed depreciation of the amalgamating company on the grounds that the assessee has failed to fulfill the conditions prescribed u/s. 72A(2)(b)(iii) of the Act r.w.r. 9C of the Income Tax Rules, 1962. The assessee has also challenged the disallowance of Rs. 4,26,863/- being 10% of the purchases made from alleged accommodation entry providers viz. M/s. Arihant Exports and M/s. Adi Impex.

4. Brief facts are that the assessee company is engaged in the business of manufacturing of gold and diamond studded jewellery exclusively for exports and had e-filed its return of income dated 29.11.2024, declaring total income at Rs. 33,19,89,990/-, under the normal provision and book profit of Rs. 36,11,71,961/- u/s. 115JB of the Act. The assessee's case was selected for complete scrutiny under CASS and notice u/s. 143(2) and 142(1) were duly issued and served upon the assessee. During the assessment proceeding, the ld. AO observed that the assessee has shown business income of Rs. 30,83,35,347/- after claiming set off of brought forward business loss amounting to Rs. 2,52,04,182/-, 'Income from other sources' at Rs. 2,50,93,647/- and after claiming deduction u/s 80G of the Act at Rs.14,39,000/-, thereby declaring total income of

Rs.33,19,89,990/-. The ld. AO passed the assessment order u/s. 143(3) of the Act, dated 30.11.2016, determining total income at Rs. 36,23,93,420/- and Rs. 36,27,61,525/- u/s. 115JB of the Act, after making the said additions/disallowances.

5. Aggrieved the assessee was in appeal before the first appellate authority, who vide order dated 08.08.2024, partly allowed the assessee's appeal.

6. Both the assessee as well as revenue are in appeal before us, challenging the impugned order of the ld. CIT(A).

7. The first ground of appeal raised by the assessee is challenging the denial of claim of brought forward business loss u/s. 72A(2)(b)(iii) of the Act r.w.r. 9C of the Income Tax Rules, 1962, amounting to Rs. 2,52,04,161/-. The facts of this ground are that M/s. Aditi Jewels Private Limited got amalgamated with the assessee company w.e.f. 01.04.2013 as per the order of Hon'ble Bombay High Court, dated 10.01.2014.

8. The learned Authorised Representative ('ld. AR' for short) for the assessee contended that the assessee was entitled to claim set off of brought forward business losses of amalgamated company M/s. Aditi Jewels Private Limited against the income of the amalgamated company by virtue of the High Court order. The ld. AR further stated that the assessee has satisfied all the conditions prescribed u/s. 72A r.w.r. 9C of the Income Tax Rules, 1962 but the ld. AO as well as the ld. CIT(A) has merely rejected the assessee's claim for non-submission of form 62. The ld. AR further stated that the assessee was even otherwise not entitled to submit form 62, for the reason that the nature of business of the assessee company is mainly labor-intensive industry, where the production is solely dependent on a large number of workers who are skilled and

semi-skilled labors. The ld. AR further stated that the specified installed capacity as in other industry does not apply to the assessee's nature of business and therefore, the installed capacity of human being is humanly not possible to be determined in assessee's case which majorly depends on machineries for the purpose of form 62. The ld. AR iterated that the assessee has achieved the production level of atleast 50% which is the norm for claiming the benefit of set off of brought forward losses by the amalgamated company as per Section 72A of the Act. the ld. AR relied on the decision of the Hon'ble High Court of Madras in the case of ***Principal Commissioner of Income-tax vs. Lotte India Corporation Ltd. [2020] 118 taxmann.com 225 (Madras)/[2020] 274 Taxman 63 (Madras)[29-07-2020]***.

9. The learned Departmental Representative (ld. DR for short) on the other hand controverted the said fact and contended that the assessee has not fulfilled the conditions prescribed u/s. 72A r.w.r. 9C of the IT Rules, 1962. The ld. DR further stated that the assessee has failed to furnish form 62 for claiming benefit of set off of brought forward losses by the amalgamated company. The ld. DR relied on the order of the lower authorities.

10. We have heard the rival submissions and perused the materials available on record. The issue pertaining to this grounds is whether the assessee is entitled to claim of set off of brought forward losses of Rs. 2,52,04,181/- as on 31.03.2013 of the amalgamating company M/s. Aditi Jewels Pvt. Ltd. which has merged with the assessee company during the year under consideration as per the provisions of Section 72A r.w.s. 9C of IT Rules, 1962. It is trite to reproduce the said provision for ease of reference:

72A. [86]*[(1) Where there has been an amalgamation of—*

(a) *a company owning an industrial undertaking or a ship or a hotel with another company; or*

(b) *a banking company referred to in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949)*[87] *with a specified bank; or*

[88]*[(c) one or more public sector company or companies with one or more public sector company or companies; or*

(d) *an erstwhile public sector company with one or more company or companies, if the share purchase agreement entered into under strategic disinvestment restricted immediate amalgamation of the said public sector company and the amalgamation is carried out within five years from the end of the previous year in which the restriction on amalgamation in the share purchase agreement ends,]*

then, notwithstanding anything contained in any other provision of this Act, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, as the case may be, allowance for unabsorbed depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly:]

[89]*[**Provided** that the accumulated loss and the unabsorbed depreciation of the amalgamating company, in case of an amalgamation referred to in clause (d), which is deemed to be the loss or, as the case may be, the allowance for un-absorbed depreciation of the amalgamated company, shall not be more than the accumulated loss and unabsorbed depreciation of the public sector company as on the date on which the public sector company ceases to be a public sector company as a result of strategic disinvestment.*

Explanation.—For the purposes of clause (d),—

(i) *"control" shall have the same meaning as assigned to in clause (27) of section 2*[90] *of the Companies Act, 2013 (18 of 2013);*

(ii) *"erstwhile public sector company" means a company which was a public sector company in earlier previous years and ceases to be a public sector company by way of strategic disinvestment by the Government;*

[91]*[(iii) "strategic disinvestment" means sale of shareholding by the Central Government or any State Government or a public sector company, in a public sector company or in a company, which results in--*

(a) *reduction of its shareholding to below fifty-one per cent; and*

(b) *transfer of control to the buyer:*

***Provided** that the condition laid down in sub-clause (a) shall apply only in a case where shareholding of the Central Government or the State Government or the public sector company was above fifty-one per cent before such sale of shareholding:*

***Provided further** that requirement of transfer of control referred to in sub-clause (b) may be carried out by the Central Government or the State Government or the public sector company or any two of them or all of them.]]*

[92]*[(2) Notwithstanding anything contained in sub-section (1), the accumulated loss shall not be set off or carried forward and the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless—*

(a) *the amalgamating company—*

(i) has been engaged in the business, in which the accumulated loss occurred or depreciation remains unabsorbed, for three or more years;

(ii) has held continuously as on the date of the amalgamation at least three-fourths of the book value of fixed assets held by it two years prior to the date of amalgamation;

(b) the amalgamated company—

(i) holds continuously for a minimum period of five years from the date of amalgamation at least three-fourths of the book value of fixed assets of the amalgamating company acquired in a scheme of amalgamation;

(ii) continues the business of the amalgamating company for a minimum period of five years from the date of amalgamation;

(iii) fulfils such other conditions as may be prescribed[93] to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose.]

(3) In a case where any of the conditions laid down in sub-section (2) are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the amalgamated company shall be deemed to be the income of the amalgamated company chargeable to tax for the year in which such conditions are not complied with.

***9C.** The conditions referred to in clause (iii) of sub-section (2) of section 72A shall be the following, namely:—*

(a) the amalgamated company, owning an industrial undertaking of the amalgamating company by way of amalgamation, shall achieve the level of production of at least fifty per cent of the installed capacity of the said undertaking before the end of four years from the date of amalgamation and continue to maintain the said minimum level of production till the end of five years from the date of amalgamation :

***Provided** that the Central Government, on an application made by the amalgamated company, may relax the condition of achieving the level of production or the period during which the same is to be achieved or both in suitable cases having regard to the genuine efforts made by the amalgamated company to attain the prescribed level of production and the circumstances preventing such efforts from achieving the same;*

(b) the amalgamated company shall furnish to the Assessing Officer a certificate in Form No. 62, duly verified by an accountant, with reference to the books of account and other documents showing particulars of production, along with the return of income for the assessment year relevant to the previous year during which the prescribed level of production is achieved and for subsequent assessment years relevant to the previous years falling within five years from the date of amalgamation.

Explanation.—For the purposes of this rule,—

(a) "installed capacity" means the capacity of production existing on the date of amalgamation; and

(b) "accountant" means the accountant as defined in the Explanation below sub-section (2) of section 288 of the Income-tax Act, 1961.]"

11. From the above, it is evident that Section 72A(2)(b)(iii) of the Act prescribes the amalgamated company should fulfil the conditions for ensuring the revival of the

business of the amalgamating company or to ensure that the amalgamation is for genuine business along with the other conditions prescribed u/s. 72A of the Act. Further, Rule 9C provides that the amalgamated company shall furnish a certificate in form 62 duly verified by an accountant with regard to the books of account and other documents along with the return of income containing the prescribed level of production for the year under consideration and for subsequent assessment years within 5 years from the date of amalgamation. The ld. AO rejected the assessee's claim for failure to furnish form no. 62 and also for the reason that the assessee has failed to substantiate as to why form 62 was not filed before the ld. AO for the year under consideration. The ld. AR relied on the decision of the Hon'ble High Court of Madras in the case of ***Lotte India Corporation Ltd. (supra),*** where on identical facts it was held that when the amalgamated company has achieved 100% of the installed capacity of production and has complied with the other conditions then filing of form 62 which is only directory and the non-compliance of the same would not disentitle the assessee to claim carry forward losses to be set off. The relevant extract of the said decision is cited herein under for ease of reference:

> ***"6.*** *The relevant provisions of section 72A read with rule 9C are very clear in this regard. These provisions clearly stipulate that after the merger, within four years, the amalgamated company should achieve at least 50% of the installed capacity of production. Though the learned Tribunal, in its order, has not discussed the facts and figures as discussed by the Commissioner of Income-tax (Appeals) in its order quoted above, it has observed that the non-filing of prescribed Form No. 62 for the third Assessment Year, after amalgamation, namely AY 2006-07, is not relevant, because the mark of 50% of installed capacity of production can be achieved at any point of time within four years after the date of merger, which is 1-4-2003 in the present case. Even though the exact date of crossing over the mark of 50% cannot be ascertainable in the present case, but the fact is undisputed that in the fourth year, the amalgamated company achieved more than 100% of its installed capacity of production. We do not think that the requirement of filing of the requisite information in Form No. 62 for the third assessment year can be said to be a condition precedent or a mandatory condition to allow the Assessee to carry forward such losses under section 72A of the Act. The*

said condition of filing the Form No. 62, at best, is only directory and non-compliance thereof would not disentitle the Assessee to claim such carry forward losses to be set off against the profits of the Assessee company. There is no dispute before us that the fact of crossing of the 50% of installed capacity of its production stood achieved by the Assessee in the present case in the fourth year, as would be clear from the order of the Commissioner of Income-tax (Appeals) for AY 2007-08, which is produced on record and quoted above."

12. It is observed that the ld. AO as well as the ld. CIT(A) has rejected the assessee's claim of brought forward business losses only for non-filing of form no. 62, which the Hon'ble High Court has held to be not a mandatory condition when the assessee is said to have complied with the other conditions viz. the 50% of installed capacity of its production within 4 years after the merger as per the provisions of the Section 72A of the Act. By respectfully following the said proposition, we hereby hold that the assessee's claim cannot be disallowed merely for non-filing of the form no. 62. Pertinently, neither the ld. AO nor the ld. CIT(A) has specified about the desired installed capacity and the assessee has also not brought the exact figures before us to show that it had crossed the mandatory 50% installed capacity within the specified time limit. We therefore are of the considered view that this issue is to be remanded back to the ld. AO to allow the claim of the assessee after satisfying that the assessee has fulfilled all the conditions prescribed u/s. 72A r.w.r. 9C of the IT Rule, 1962.

13. In the result, ground no. 1 filed by the assessee is allowed for statistical purpose.

14. Ground no. 2 pertains to disallowance of Rs. 42,68,634/- on account of bogus purchases made from M/s. Arihant Exports and Aadi Impex made by the ld. AO and restricted to Rs. 4,26,863/- by the ld. CIT(A) on 10% of the total purchase value of Rs. 42,68,634/.

15. Both the assessee as well as the revenue are in cross appeals before us, challenging the said disallowance. It is observed that the assessee has purchased raw materials from the

said parties which according to the sales tax authority are bogus purchases from hawala parties, where the ld. AO made this addition on the basis of the information received from the sales tax department that the purchases made by the assessee of Rs. 42,68,634/- are from hawala parties. The assessee contended that for A.Y. 2011-12 to 2013-14 addition on bogus purchases was restricted to 5% and the ld. CIT(A) on the other hand restricted to 10% of the total alleged bogus purchases. It is observed that based on the search action conducted by the investigation wing in the case of Shri Rajendra Jain and Shri Surendra Jain who are controlling and managing M/s. Arihant Export and Adi Impex as per their statement recorded on oath, it was found that the assessee was one of the beneficiaries of accommodation entries by way of bogus purchases of diamonds without any actual purchase. The assessee had furnished the details of all purchase invoices for diamonds bought from M/s. Aadi Impex and Arihant Exports along with purchase bills and has also given details of the export sales made by the assessee, where the ld. AO observed that the assessee has obtained accommodation entry of Rs. 1,94,232/- and 35,86,485/- respectively from the above said parties and even the amalgamating company M/s. Aditi Jewels Pvt. Ltd. is also said to have availed accommodation entry of Rs. 1,01,213/- and 75,125/- from the two concerns controlled and managed by Rajendra Jain group. The assessee contended that it had furnished the copies of all purchase bills in which the customs stamps are endorsed in all these bills after due verification of the materials that are purchased from M/s. Aadi Impex and M/s. Arihant Exports. The assessee is also said to have furnished details of the exports done by the assessee out of the diamonds purchased from these two entities. The ld. AO

rejected the assessee's contentions by relying on the statement of Shri Rajendra Jain who had admitted to providing accommodation entries to various beneficiaries. It is also observed that the proprietor of M/s. Aadi Impex and M/s. Arihant Exports viz. Shri Anoop V. Jain and Shri Sachin Pareek had admitted that they were mere employees acting on the behest of Shri Rajendra Jain and Shri Surendra Jain whose *modus operandi* was to import rough and cut and polish diamonds for beneficiaries who do not want to disclose the materials imported in their books of accounts and in turn, the hawala companies issue bills to these parties for a specified commission. The ld. AO made 100% addition on the impugned purchases and the first appellate authority restricted the same to 10% of the bogus purchases on the ground that the ld. AO has merely made the addition on the basis of the earlier years assessment for A.Y. 2010-11, 2011-12 and 2013-14, where the addition was at 5% on the bogus purchases. The ld. CIT(A) relied on the decision of the Hon'ble High Court of Gujrat in the case of ***CIT vs. Simit P. Sheth 356 ITR 051*** and ***Bholanath Polyfab Pvt Ltd. 355 ITR 290 (Guj.),*** where only the profit element arising out of the bogus transaction was added to the total income. The ld. DR for the revenue contended that the assessee has failed to produce VAT/TIN and PAN number of the sellers from whom the assessee is alleged to have purchased raw materials and on verification only the VAT number of M/s. Adi Impex was available, whereas the PAN of both parties were not available.

16. In the above facts of this issue, it is observed that the ld. AO has made 100% addition on the alleged bogus purchases by relying on the statement of Shri Rajendra Jain and Shri Surendra Jain. The ld. CIT(A) though has admitted the same to be bogus purchases

has restricted the disallowance to 10%. Admittedly, the issue of bogus purchases was there in the assessee's case for A.Y. 2010-11, 2011-12 and 2013-14, where the department has made an addition of 5% to the total bogus purchases. Further, it is observed that there is no discussion by the ld. CIT(A) with regard to the evidences that were filed by the assessee pertaining to the purchases and the corresponding sales made by the assessee. The ld. AO has also failed to give a detail finding as to the evidences that were furnished by the assessee. Even before us, the assessee has failed to establish by way of cogent evidence that these were genuine purchases. In the absence of complete documentary evidences as to the alleged purchases, we find no justification in restricting the disallowance to certain percentage, herein this case, 10% by the ld. CIT(A) by relying on certain decisions. We would also place our reliance on the recent decision of the Hon'ble Jurisdictional High Court in the case of ***PCIT vs. Kanak Impex (India) Ltd. [2025] 172 taxmann.com 283 (Bombay)*** and the subsequent decision in the case of ***Drisha Impex Pvt. Ltd. [2025] 173 taxmann.com 571 (Bombay),*** wherein it was held that in case of disallowance on bogus purchases, addition should not be made by estimating profit but on the entire alleged bogus purchases, where the assessee has failed to establish the source of expenditure or the explanation offered by the assessee is not to the satisfaction of the ld. AO. Further, it held that the expenditure claimed by way of bogus purchases shall be deemed to be the income of the assessee which ought not to be allowed for deduction under any head of income. Though the decision in ***Kanak Impex (Supra)*** was on the basis of non co-operation of the assessee to discharge the onus, the subsequent decision in the case of ***Drisha Impex (Supra)*** has

dealt with the same by relying on the legal proposition laid down by the Hon'ble High Court in the case of ***Kanak Impex (Supra).*** In the present case in hand, the assessee has failed to establish the genuinity of the alleged bogus purchase and the lower authorities have also failed to discuss the reliability of the evidences furnished by the assessee in detail. For this reason, we deem it fit to remand this issue back to the file of the ld. CIT(A) to consider the documentary evidences of the assessee and if required shall admit any further evidences which is deemed fit and to decide the issue afresh in the light of the decision of the Hon'ble Jurisdictional High Court in the case of ***Kanak Impex and Drisha Impex (supra)***.

17. In the result, ground no. 2 of the assessee's appeal and ground no. 1 of the revenue's appeal are allowed for statistical purpose.

18. Ground no. 2 of the revenue's appeal is on the addition/disallowance made u/s. 14A r.w.r. 8D of the Act. It is observed that the assessee company has earned dividend income of Rs. 3,16,64,056/- from mutual funds which has been claimed exempt in the computation of income u/s. 14A. The assessee submits that the investment in mutual funds and equity shares as on 31.03.2013 was Rs. 13,36,29,385/- and Rs. 19,23,67,484/- as on 31.03.2014. The assessee further stated that it had incurred PMS expenses of Rs. 3,19,964/- STT and other expenses are Rs. 3,38,987/- aggregating to Rs. 6,58,951/- and made suo moto disallowance on the same. The assessee is said to have worked out the disallowance of expenses as per Rule 8D(2)(iii) at Rs. 7,64,992/- which is 0.5% of the average value of investment as per the current investment details in note 13 of the balance sheet as on 31.03.2014, which includes mutual funds and investment in PMS

and as per Rule 8D(2)(ii) at Rs. 97,578/- being disallowance of interest expenses incurred on PSL/EBRD loans. The ld. AO made a disallowance of Rs. 9,30,613/- after reducing the suo moto disallowance made by the assessee amounting to Rs. 6,58,951/- from the total disallowance of Rs. 15,89,564/-.

19. Aggrieved the assessee was in appeal before the first appellate authority, who had deleted the impugned addition/disallowance on the ground that the ld. AO has invoked the provision of Rule 14A r.w.r 8D without recording his dissatisfaction as to the correctness of the claim made by the assessee in accordance with the decision of the Hon'ble Apex Court in the case of ***Godrej Boyce and Manufacturing Co. Ltd. and vs DCIT (394 ITR 449 SC).*** Further, the ld. AO has failed to consider that only the average value of those investment which has yielded exempt income should have been considered in light of the decision of the Hon'ble Delhi High Court in the case of ***ACB Ltd. TS 176 HC 2015 DEL.***

20. From the above facts and on perusal of the rival contentions, it is observed that the ld. AO has invoked Section 14A r.w.r. 8D mechanically without recording his dissatisfaction as to the correctness of the claim of the assessee. It is a settled proposition of law by the Hon'ble Apex Court and various High Courts that the ld. AO will have to mandatorily record his satisfaction as to why Section 14A r.w.r. 8D is to be invoked. In the present case in hand, we find that the ld. AO has failed to record the dissatisfaction as to the claim of the assessee. On this observation, we find no infirmity in the order of the ld. CIT(A) in deleting the impugned addition/disallowance. We therefore deem it fit to dismiss ground no. 3 and 4 raised by the revenue.

21. In the result, the appeal filed by the assessee and revenue are partly allowed for statistical purpose.

Order pronounced in the open court on 09.05.2025

Sd/-	**Sd/-**
(OM PRAKASH KANT)	**(KAVITHA RAJAGOPAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated: 09.05.2025
Karishma J. Pawar (Stenographer)

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT- concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai