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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH -G
BEFORE HON'BLE PRESIDENT SHRI VIMAL GANDHI AND
SHRI P.M.JAGTAP, ACCOUNTANT MEMBER

ITA No. 612/Del/2005
Asstt. Year: 2001-02

M/s Kishan Lal Jewels Pvt.Ltd.
1244, Kucha Mahajani,
Chandni Chowk,
Delhi-110006.

vs

The Asstt. C.I.T.
Cent. Cir. -9,
New Delhi.

(PAN/GIR No.: AABCK 5077 B/K-18.)

(Appellant)

(Respondent)

Appellant by: Shri Arun Jain, and Sh. V.Mohan, C.A
Respondent by: Shri C.Lal, CIT (DR).

ORDER

PER VIMAL GANDHI, PRESIDENT.

This appeal by the assessee for assessment year 2001-02 is directed against order of CIT (Appeals) dated 2.12.2004. Although several grounds have been raised but main ground pertains to addition of Rs 4,29,74,424/- made u/s 68 of the Income-tax Act.

2. The facts of the case are that assessee, a limited concern, which was incorporated on 26.12.2000 claimed to have exported diamonds worth Rs 4,29,74,424/-, which were shown to be purchased for Rs 1,92,87,608/-. Out of the huge profit shown by the company, it claimed rebate at 80% u/s 80HHC of the Income-tax Act.

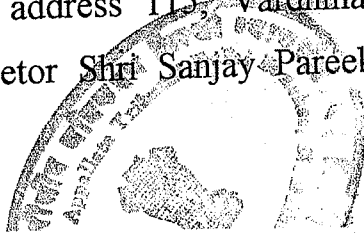


3. On scrutiny of account, the Assessing Officer found that assessee had made purchases from two parties as under:

i) M/s Vinayak Overseas, P-74, Ganpati Chamber, Bhatton Ki Gali, Opp. Hawa Mahal, Jaipur	Rs 78,30,751/-
ii) M/s Mine 'O' Gem, 115-Vardhman, Johri Bazar, Jaipur.	Rs 1,15,56,857/-

It is stated in the assessment order that investigation revealed that the alleged sellers were running a racket for arranging entries of import and export and for providing bogus bills. The revenue authorities carried investigations and found that M/s Vinayak Overseas was owned by one Shri Gauri Shanker Pareek who had given power of attorney in favour of Shri Mohan Sharma. The revenue authorities took action u/s 132 in the case of Vinayak Overseas and found that he was not operating from the address given by him. His income-tax records showed that he had filed some return at Surat but he was also not found at the address given in the return. The premises in Surat was found to be under the seal of D.R.I. Shri Mohan Sharma in his statement recorded on 8.7.2003 was unable to give whereabouts of Shri Gauri Shanker, except stating that he was staying at Bombay. He further accepted in his statement that above concern was giving entries and sale bills to accommodate people who were showing export of diamonds.

3.1 In the case of M/s Mine 'O' Gem, the Revenue carried a survey on 24.06.2003 at the address 115, Vardhman, Johri Bazar, Jaipur and statement of its proprietor Shri Sanjay Pareek was recorded u/s 131 on



04.07.2003. Shri Pareek had stated that Head Office of the concern was at 302, Chandralok Apartment, Surat. However, when a survey was carried, the above premises was found to be locked. The Assessing Officer, therefore, concluded that Mr. Sanjay Pareek had made a false statement. It was found that in his return, which was filed at Surat, his address was 204-Gopi Nath Apartment, Jadda Khadi, Mahidarpura, Surat. In the survey authorized on above premises, it was found that the premises, a flat was locked. From the income-tax record, the Assessing Officer found that for the assessment year 2002-03, M/s Mine 'O' Gen, on turnover of Rs 80.46 crore had shown net profit of Rs 64,800/- which gave ratio of 0.0008%. No books of account were found at any business premises. Shri Sanjay Pareek had promised to produce the books but that promise remained un-complied with. No stock of any kind of precious stone or semi precious stone was found with Mr. Sanjay Pareek, although in the books for the year 2002-03, it was shown at Rs 2,17,64,505/- Shri Sanjay Pareek, in his statement could not tell name of any party with whom any transaction was carried by M/s Mine 'O' Gem. It was found that from the bank account, cash was immediately withdrawn after deposit. From the above, the Assessing Officer concluded that assessee did not make any purchase of diamonds for export and its purchases are bogus. In these circumstances, there was no question of the assessee making any export.

4. The assessee was asked to produce the parties from whom purchases were made by the assessee. In its reply, the assessee reiterated that assessee exported tanzanite stone to Hongkong and New York. Reliance was placed on export documents by custom attested export bills, air bills, bank advice, copies of FIRC's and other documents. As for as, parties from whom purchases made were concerned, it was claimed that two parties had shifted

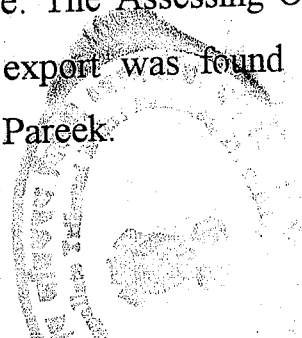


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their base to Surat and the assessee was trying to locate their present address. Further, it was submitted that if statements of Shri Gauri Shankar Pareek and Sanjay Pareek are to be used against the assessee then an opportunity of cross examination may be provided to the assessee.

5. The Assessing Officer, after going through the reply of the assessee concluded that the story of purchase and export of diamonds was not believable and made addition of Rs 4,29,74,424/- u/s 68 of the Income-tax Act, for the following reasons:

- (i) That Director of the assessee company had no experience in export and it was unlikely that even in the first year they will get huge order for export without making a foreign visit.
- (ii) That Director had no study of foreign markets and alleged claim that agents of importers had come and met in India, cannot be accepted as Directors could not identify the agents who have allegedly met the Directors of assessee company.
- (iii) The parties from whom purchases are said to have been made are themselves shown to be exporters of Gem /Diamonds. It is surprising that those parties did not export on their own behalf when margin of profit was so high but did it on behalf of the assessee. The Assessing Officer was referring to some documents where export was found to have been directly carried by M/s Sanjay Pareek.



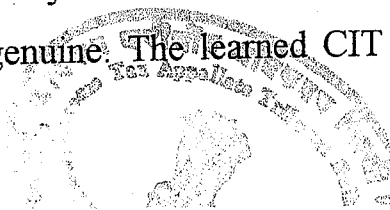
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(iv) That purchases were shown to have been made on credit basis. The Directors of assessee company were Delhi based and it is surprising that such Directors of a new company go to Jaipur to purchase high value of gems of Rs 1.93 crores without any letter of credit from the importers and get goods worth Rs 1.93 crore without any previous dealings with the seller and without giving any bank guarantee /LOC. The payments to purchasers are made only after receipt of money from the alleged export.

(v) The assessee alleged to have exported goods worth Rs 4.29 crores to New York and Hong Kong without obtaining any bank guarantee or letter of credit from importer bank. Such high value exports were made by the assessee for the first time without any prior dealing with the importers of goods. This was unbelievable.

6. It was further found that description in the purchase bill of the articles did not tally with the particulars shown in export documents. The documents found also showed that some of the shipping bills bear the name of Shri Sanjay Pareek, Proprietor of M/s Mine 'O' Gem. It is beyond logic as to why Sanjay Pareek should export goods on behalf of the assessee company. According to the Assessing Officer, Sh.Sanjay Pareek was part of the bogus racket and must have arranged the shipping bills for the assessee. Accordingly addition as noted above was made in the assessment.

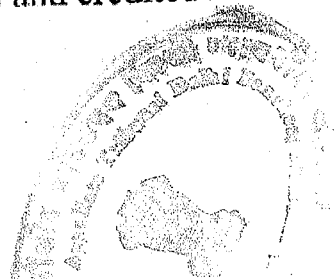
7. The assessee impugned above addition and in appeal tried to explain the objection raised by the A.O for not accepting purchases and export by the assessee as genuine. The learned CIT (Appeals) after taking



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into account explanation furnished on behalf of the assessee agreed with the view taken by the Assessing Officer and upheld the addition of Rs 4,29,74,424/-. He also rejected other grounds relating to relief claimed u/s 80HHC, claim of limitation and charging of interest u/s 234B of the Income-tax Act.

8. The assessee being aggrieved has brought the issue in appeal before the Appellate Tribunal. We have heard both the parties. The learned counsel for the assessee Shri Ved Jain in his argument reiterated that Assessing Officer did not challenge any of the credit entries and on the basis of certain enquiries made at the back of the assessee held that purchases made by the assessee were bogus. As purchases were held bogus, so the sales were also treated as bogus and accordingly provisions of Section 68 were applied to credit entries of the export. All the material collected by the assessee was used in violation of principle of natural justice. The assessee was never allowed any opportunity to cross examine the witnesses like Shri Gauri Shanker or Shri Sanjay Pareek. At any rate, when exports are genuine and when amount was received from abroad through the banking channel, there is no question of application of section 68 of the Income-tax Act, particularly when genuineness of export and receipt of amount from abroad had not been doubted. It was accordingly submitted that addition made be deleted. A copy of Note sheet containing objections raised by the A.O. and assessee's reply was filed on record. Our attention was also drawn to the bank statement and other documents through which amount in question was received and credited in the books of account of the assessee.



9. The learned Departmental Representative opposed above submissions and relied upon orders of the revenue authorities.

10. We have given careful thought to the rival submissions of the parties. As is clear from the circumstances noted above, the revenue authorities carried deep investigation through survey and searches at the premises of the parties from whom the assessee had claimed to have purchased diamonds for export. Material collected by them is sufficient to reach a conclusion that alleged purchases were not genuine. These purchases are surrounded by doubts and suspicions which assessee has not been able to remove. Even in the appellate proceedings relating to whereabouts of Prop of M/s Vinayak Overseas who allegedly sold diamonds worth Rs 78,30,751/- to the assessee, the assessee had contended as under:

“It is quite possible that the party has shifted to some other place and it is not the duty of the appellant to keep the track of all the parties concerned.”

In respect of observations made by the A.O. on M/s Mine ‘O’ Gem, the learned Authorised Representative in the appellate proceedings relied upon the impugned order and A.O’s observations, “that the premises remained locked”. It was argued that the record did not show that the firm was not running there. It was not necessary that a person sits at the place of business for the whole of the time. The learned A.R. also stated that the place of business has not much importance in this line of business but the important was how much relation one has with the persons dealing in the precious or semi precious stone.” To the objection that cheque / D.D. given to the parties from whom goods were purchased were immediately

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withdrawn, the A.R. contended that what these parties have done with the money has got no concern with the appellant. Such like explanations were given on every point but have not been accepted by the learned CIT (Appeals). Having regard to cumulative effect of all the circumstances taken together, one can be convinced that purchases cannot be accepted as genuine. From the above, the A.O. and on appeal, the CIT (Appeals) further concluded that where purchases were not genuine, there is no question of genuine sale or export and, therefore, the whole story of export was doubted and disbelieved. Accordingly, credit entries for total sum of Rs 4,29,74,424/- were assessed u/s 68 of the I.T.Act. The pertinent question there is whether on the facts and circumstances of the case, the application of section 68 is justified. There is small objection of the assessee that material used against the assessee was not put to the assessee in accordance with law.

11. Now to answer the first and the main question relating to the application of Section 68, we deem it appropriate to reproduce the said provision:

"Cash credits.

²¹68. ²²Where any sum is found credited in the books²³ of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the ²⁴[Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."

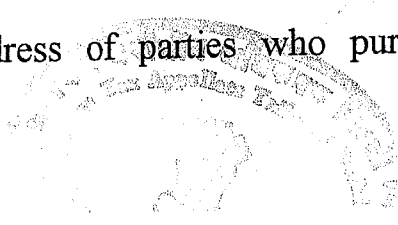
It is not the case of the assessee that above provision is not applicable to alleged sale receipts. Sale receipt can be treated like any other credit and assessee called upon to explain the nature and source of such receipt. It is

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now well settled law that for explaining cash credit the assessee has to establish three things:

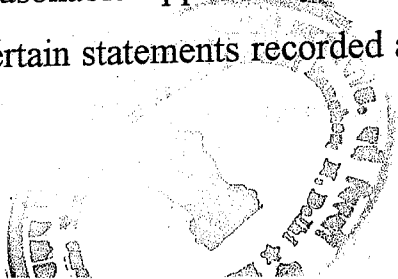
- (i) Genuineness of the entry of credit,
- (ii) Identity of the creditors, and
- (iii) The creditworthiness of the creditor.

The burden to show that all the three conditions / characteristics are satisfied is on the assessee. But in every case of application of section 68, the nature and source of sum found credited has first to be examined. In the present case, the A.O. has not said anything on the nature of the credit appearing in the books of account. It has also not recorded any finding as to source of these credits. In the view of the A.O and of learned CIT (Appeals), the purchases were bogus and, therefore, there is no question of any sale or export. The credit entries have, therefore, been taken to be bogus for the purposes of section 68. Above approach of the Revenue authorities can not be accepted. In our considered opinion, it was necessary to examine nature of the entries and thereafter explanation of the assessee, if any, furnished relating to the credit entries. It appears to us that without examining above important aspect and without recording a proper finding thereon, provision of section 68 has not been properly applied. There is no gainsaying that credit in books can be treated as deemed income of the assessee and, therefore, it is necessary to concentrate on the credit, its nature and source. We are unable to say that inference of no sale or export can not be drawn if the purchases are held to be bogus. But if assessee has also shown sales and sale consideration is claimed to have been received through the banking channels with names and address of parties who purchased goods and



remitted the amount, it will not be proper to hold credits as bogus without examining the credit entries and the background of the creditors. The genuineness or otherwise of the credit entries has to be examined. It is not uncommon to see that trading accounts of the assessee rejected with part or whole of purchases are found as in-genuine. In those cases, disallowance is made out of the purchases. If purchases partly or wholly are not genuine, then appropriate disallowance is to be made. Entire in-genuine purchases can be disallowed and sales can be subjected to tax depending upon the facts and the circumstances of the case. In other cases some reasonable amount may have to be allowed as deduction towards purchases. The present case where purchases were held to be bogus, those could have been disallowed. But that has not been done and alleged sales assessed u/s 68 of the Income-tax Act.

12. The sale receipts have been treated as bogus as purchases were bogus and assessee was dealing with people indulging in giving Hawala entries only. This was done without examining the nature of the credit entries and without providing reasonable opportunity to the assessee to explain those credit entries. The explanation of the assessee relating to the credit entries has not been examined at all. There is no doubt that burden of proof to prove that credit entries are genuine, is on the assessee. But the question of discharge of burden is required to be decided on examination and appraisal of material available on record. The present case was decided without such an appraisal and without considering the question with reference to material relating to the credit entries. We have held above that reasonable opportunity was not afforded to the assessee as, in our opinion, certain statements recorded at the back of the assessee have been relied upon



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without putting those statements to the assessee and without considering his request to cross-examine those witnesses used by the revenue.

13. In the light of above discussion, we are of view that this case should be remitted back to the Assessing Officer for re-examination and application of section 68 of the Income-tax Act in the light of our observations made above. During the course of re-examination, it may be necessary to again call witnesses connected with the purchases shown by the assessee. Having regard to the finding that whereabouts of such witnesses are not known, the revenue authorities will do well to hand over Dasti summons to the assessee, if request is made by the assessee to call the witnesses for his examination. The complaint of the assessee relating to observation of violation of principle of nature should also be examined during the course of fresh hearing by the revenue authorities. Other grounds are linked with the main addition discussed above. Therefore, orders on those grounds are also remanded to the Assessing Officer for re-examination and for fresh considerations in accordance with law. For the aforesaid reasons, impugned orders are set aside and matter restored to the file of the Assessing Officer.

14. In the result, assessee's appeal is allowed for statistical purposes.

Pronounced in Open Court on ... 12.9.2008

(P.M Jagtap)
ACCOUNTANT MEMBER

Dated: September 12, 2008.
DRS

(Vimal Gandhi)
PRESIDENT

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✓ Copy of the order forwarded to:
M/s Kishan Lal Jewels Pvt.Ltd., 1244, Kucha Mahajani, Chandni Chowk,
Delhi-110006.
Dy. CIT, Cent.Cir-9, New Delhi.
CIT
CIT(A)-II, New Delhi.



WS
Dy.Registrar, ITAT
सहायक पंजीकार
Assistant Registrar
आयकर अपीलीय अधिकरण
Income Tax Appellate Tribunal
दिल्ली पीठ, नई दिल्ली
Delhi Bench, New Delhi