

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.2193 OF 2013

Cenzer Industries Ltd. .. Appellant.
Vs.
The Income Tax Officer & Ors. .. Respondents.

Mr. Deepak Tralshawala with Mr. Vishnu Hadade for the appellant.
Ms. S.V. Bharucha for the respondents.

**CORAM : M. S. SANKLECHA &
A.K. MENON , JJ.**

DATED : 2ND MAY, 2016

P.C. :

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the 'Act') challenges the order dated 12th June, 2013 passed by the Income Tax Appellate Tribunal (the 'Tribunal'). The impugned order relates to Assessment Year 2006-07.

2. The appellant has urged the following reframed questions of law for our consideration :-

“(i) Whether on the facts and in the circumstances of the case and in law, whether the Tribunal was justified in dismissing the appeal of the appellant and upholding the orders of Respondent A.O. and C.I.T. (A) ?

(ii) Whether on the facts and in the circumstances of the case, and in law, whether the Tribunal was right in confirming the addition of Rs.4,77,58,412/- as unexplained expenditure from undisclosed sources under Section 69C, without appreciating that this reimbursement was not debited to the profit and loss account ?

(iii) Whether on the facts and in the circumstances of the case, and in law, the Tribunal was justified in confirming the addition law in rejecting the additional evidence contained in pages 1 to 21 and 28 to 228 of the paper book submitted without assigning any reason ?

(iv) On the facts and in the circumstances of the case and in law, whether the Income Tax Appellate Tribunal was right in law in confirming the addition to the extent of Rs.4,77,58,412/- as unexplained expenditure being the value of 3,400 gold coins although the cost of these 3,400 gold coins purchased by the appellant on behalf of Sagem Sa France are reimbursed expenditure ?

(v) On the facts and in the circumstances of the case and in law whether there was any material before the tribunal to confirm the addition of Rs.4,77,58,412/- as unexplained expenditure without fully and properly discussing the various arguments made and affidavit submitted ?”

Although the above questions have been raised the basic issue which arises for our consideration is whether in the

facts and circumstances of the case the tribunal was justified in confirming the addition of Rs.4.77 crores to determine the appellant's income chargeable to tax ?

3. The appellant is engaged in the business of manufacturing of watches, calculators and also in trading of mobiles. The appellant had in its return of income for the subject assessment year disclosed book profit of Rs.1.61 crores under Section 115JB of the Act. During the course of assessment proceedings the Assessing Officer called upon the appellant to explain its claim for deduction of selling and distribution expenses aggregating to Rs.9.53 crores. The appellant explained that in its activity of trading in mobiles had received contribution from M/s. Sagem France , M/s. Palmone Asia Pacific Ltd. and from M/s. Japan CBN aggregating to Rs.7.72 crores. The appellant pointed out that the above reimbursement had been deducted and it had claimed only an amount of Rs.1.80 crores which was reflected in the Profit and Loss account under Schedule 12 as selling and distribution expenses. The Assessing Officer on consideration of response of the appellant came to conclusion that no evidence was produced relating to expenditure for selling and distribution in so far as in relates to discount, sales incentives or gold coins. In the above view, the Assessing Officer concluded that the appellant was unable to prove expenditure and accordingly the amount of

Rs.8.77 crores being difference between to Rs.9.53 crores and Rs.75.74 lakhs in support of which evidence was produced was added to the appellant's income.

4. Being aggrieved the appellant carried the issue in appeal to the Commissioner of Income Tax (Appeals). During the hearing before the Commissioner of Income Tax (Appeals), the appellant produced additional evidence and submitted the details of selling and distribution expenses as under :

Accounting Head	Gross	Reimbursement (Rs.)	Net (Dr. to P & L A/c.) (Rs.)
Advertisement	8,38,54,861	7,71,04,074	67,50,887
Sales Promotion	2,82,418	1,30,981	1,51,437
Commission	28,41,650	--	28,14,650
Discount	39,94,866	--	39,94,866
Sales Incentive	43,47,581	--	43,47,581
	9,53,21,476	7,72,35,055	1,80,86,421

Reimbursement from - Sagem SA CMB Rs. 7,68,99,073

Reimbursement from - Palmone Asia Pacific Ltd.	Rs. 2,05,001

	Rs. 7,71,04,074
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5. In view of the additional evidence produced by the appellant a remand report was called for from the Assessing Officer by the Commissioner of Income-Tax (Appeals). During the

proceeding the appellant was asked to explain as to how this expenditure of Rs.4.77 crores on account of gold coins is to be treated as expenditure incurred for purposes of business. The appellant in response to the same pointed out that the gold coins were purchased from one M/s. Opal Industries a sole proprietary concern of Mr. Subhash Gujar with motive of increasing sales of mobile handset as these gold coins were inserted in mobile handset on random basis so as to motivate the purchase of the same. In support the bills which were produced did not inspire confidence resulting in the Commissioner of Income Tax (Appeals) directing the Pune Commissioner (Directorate) to verify the details of M/s. Opal Industries. In consequences of the same, the Pune Commissioner (Directorate) on investigation reported on 25th March, 2011 as under :

- “(i) M/s. Opal Industries has no connection with the business of dealing in Gold bars. It was engaged in the business of assembling and marketing of wall clocks in the brand name 'Opal'.*
- (ii) Mr. Subhash P. Gujar, Proprietor of Opal Industries having PAN ABFPG7251F has not filed any income tax returns for M/s. Opal Industries.*
- (iii) Mr. Subhash P. Gujar stated in his statement recorded on oath that a single transaction of purchase and sale of Gold Bars was done either in Financial Year 2004-05 or 2005-06.*
- (iv) He could not give any documentary evidences like purchase/sale bills, delivery challans,*

transport receipts etc. He could not tell the name of the parties from whom the gold bars were purchased and to whom sold and the names of the bank through which such transactions were carried out. Subsequently, Mr. Subhash Gujar has admitted in his statement that he has no documentary evidence in respect of the gold transactions.”

6. On consideration of the entire evidence and the submissions of the appellant, the Commissioner of Income-Tax concludes in paragraph 5.4.4. of his order as under :

“5.4.4. I have carefully and dispassionately considered the facts and circumstances and after going through the remand reports of the LAO and the counter comments given by the appellant, the following points emerge for consideration :-

- Purchase of Gold from Opal Industries who is into manufacturing of wall clocks.*
- Opal industries did not have any knowledge of dealing in gold.*
- Cenzer carried out transactions in gold worth Rs. 4.77 crores with Shri Subhash Gujar of Opal Industries without ascertaining his creditworthiness.*
- It was a one time transaction of gold of Opal Industries.*
- Cenzer chose to pay advance of more than a crore of rupees to Opal Industries who did not have requisite knowledge and*

ability to execute transaction in Gold.

- The proprietor of Opal Industries does not even remember the party from whom the gold was purchased. Neither does he remember to whom the gold was subsequently.*
- The proprietor of Opal Industries also does not remember how the delivery was taken/given.*
- Allegation by Director of Cenzer that proprietor of Opal Industries is of unsound mind, is totally baseless.*
- The Director of Cenzer knew the proprietor of Opal Industries for the past 15 years.*
- The Director of Cenzer also knew the Director of M/s. Riddhi Siddhi Bullion Ltd. both from the same native place.*
- M/s Riddhi Siddhi Bullion Ltd. sold gold bars to Opal and Opal Industries sold the same in form of gold coins to Cenzer. Opal Industries did not have expertise in conversion of gold bars to gold coins.*
- Opal Industries sold gold coins to Cenzer on 14.06.2005 even though it received the gold bar two days later. The transaction seems bogus since there was no opening stock of gold.*
- The last delivery of gold bars (30kg) taken on 31.01.2006 at Mumbai and on the same date gold coins were delivered by Opal to Cenzer at Bhiwandi.*
- No stock register maintained by assessee for gold.*

- *Bank statement of Opal Industries from the Addl DIT (Inv) Pune does not indicate any debit for conversion charges of gold.*
- *On the three transactions of gold, Opal Industries has earned a profit of .011% on the sale proceeds which do not even include gold conversion charges. No prudent businessman would opt for such a low profit margin for a one time transaction.*
- *None of the invoices are signed by the person who has taken hand delivery of gold.*
- *During the Statement recorded on Oath, Director of Cenzer did not remember the person who had taken hand delivery of three high value consignments.*
- *No evidences were produced by the assessee for having launched any advertisements for Gold Scheme.*
- *The assess failed to produce documentary evidence to indicate that prior approval of SAGEM SA was obtained for advertisement of the product.*
- *The assessee's claim for increase in sales cannot be said to be directly attributable to the launch of gold coin scheme particularly since the assessee failed to produce the evidence to that effect.*
- *The assessee failed to identify even a single customer who won any gold coin under the scheme.*

In the above view disallowance of Rs.8.77 crores was reduced to Rs.4.77 crores i.e. restricted only to the claim made for purchase of gold coins from M/s.Opal Industries. This on the ground that the appellant has not been able to establish that the expenditure was incurred for the purchase of gold, therefore not for purpose of business. Thus it held that the benefit of Section 37(1) of the Act cannot be granted.

7. Being aggrieved the appellant filed an appeal to the Tribunal. Before the Tribunal, the appellant claimed that entire expenditure could not be disallowed as same has not been claimed by it in profit and loss account. Thus at the highest expenditure of Rs.1.80 crores ought to have been disallowed as that was amount claimed by the appellant. Before the Tribunal, the appellant filed an affidavit of Mr.Subhash Gujar in support of its contention that gold coins had been sold by M/s. Opal Industries, to the appellant. However, the Tribunal examined affidavit of Mr. Subhash Gujar and inter alia found the same not to be believable for more than one reason. Amongst them was the fact that the affidavit itself states "that it is impractical and impossible to remember as to how the delivery of gold bars was taken or gold coins were given". Moreover, the Tribunal also came to the conclusion that no reliance can be placed on this affidavit in view

of the averments made therein. It also notices the fact that the affidavit does not state as to why statements before the authorities of oath are contradictory to statements made on oath in the affidavit. The impugned order of the Tribunal also records the fact that although the Assesssing Officer had originally disallowed an expenditure of Rs.8.77 crores in the course of remand proceedings on the basis of evidence placed on record, it was noticed that the advertisement expenses were in fact incurred by the appellant by calling in celebrities and expenditure to that extent was allowed. However it found there was not a single advertisement on record which would indicate that the gold coins were being inserted into the mobiles being sold by it except photocopies of advertisement placed on record of “Jeeto India” offer without mentioning size and/or quantity of the gold coins. Further the Tribunal holds that if the appellant wanted to launch a gold coin scheme as proposed it would propagate the same by advertisement, press report etc to make it known so as to ensure its success. Nothing was placed on record except photocopy of the brochure. Thus the genuineness of such an expense was not established. Further it records that insertion of the gold coins in the handsets was also not supported by any evidence. It also observes that opening of a handset and a coin being inserted therein is itself doubtful as 10 handsets come in one packet and these packets are distributed as such as is evident from the

Branch transfer details placed on record as a part of additional evidence. Further the impugned order also records the contention that gold coins of 20 gms was inserted in a handset is not acceptable for the simple reason that insertion of 20 gms gold coin in a handset which weighs about 100 gms would make it easily identifiable/distinguishable from a handset that does not contain a gold coin. This by itself may result in the handset not being put up for sale. This is more so when a new handset itself cost Rs.2,500/- to Rs.6,500/- whereas cost of 20 gms gold coins is more than Rs.12,000/-. This itself makes the claim incredible. Thus, on the above facts the impugned order of the Tribunal upheld the order of the Commissioner of Income-Tax (Appeals) and dismissed the appellant's appeal.

8. Mr. Deepak Tralshawala, learned counsel appearing in support of the appeal invited our attention to Section 69C of the Act to contend that the expenditure incurred could not have been disallowed as unexplained expenditure. This issue is being raised by the appellant for the first time before us as no such contention was raised/urged before the Tribunal. The issue before the authorities under the Act including the Tribunal was restricted to allowability of this deduction under Section 37(1) of the Act. In fact the appellant had also filed a Miscellaneous Application seeking to rectify the impugned order of the Tribunal dated 12th

May, 2013. In the Miscellaneous Application also there is no mention of any submission having been made with regard to Section 69C of the Act before the Tribunal. The claim was disallowed under Section 37 of the Act. In the above view, as this issue was not urged before the authorities and Tribunal, it is not open to the appellant to urge a question on Section 69C of the Act as it does not arise from the order of Tribunal. Therefore, we see no reason to examine the application of Section 69C of the Act to the present case.

9. Thereafter Mr. Deepak Tralshawala, learned counsel relied upon the decision of the Apex Court in ***M/s. Andaman Timber Industries vs. Commissioner of Central Excise in Civil Appeal No.4228 of 2006*** rendered on 2nd September, 2015 in support of his proposition that in case the revenue was relying upon statement of Shri Subhash Gujar, Proprietor of M/s.Opal Industries then the least that should have been given to the appellant was personal hearing. Thus this not having been done renders the orders not sustainable. We find that in the present case the appellant had not sought cross examination before the Commissioner of Income Tax (Appeals). In any case a fresh affidavit of Shri Subhash Gujar, proprietor of M/s.Opal Industries was filed before the tribunal. This affidavit does not seek to explain or point out circumstances under which the statement

made earlier on oath by the deponent of the affidavit Shri Subhash Gujar was incorrect. The Tribunal has been independently applied its mind to the affidavit filed by the appellant and on examination of the same found it to be unbelievable for the reasons set out in the order as extracted above. Therefore, the aforesaid decision in our view would have no application in this case. It is undisputed that where affidavit evidence is relied upon by a party and the same is challenged by other side, then an opportunity to cross examine the deponent of the affidavit is a necessary ingredient of principle of natural justice, before any reliance can be placed upon it. The appellant in the present case had before the tribunal filed a fresh affidavit on which it rested its case.

10. Mr. Deepak Tralshawala, learned Counsel then submitted that reimbursement of expenses is not chargeable to tax as it is not income. In support reliance is placed upon a decision of this Court in ***Director of Income Tax (International Transaction) vs. Krupp Udhe GMBH 354 ITR 174*** which in turn relies upon a earlier decision of this Court in ***Commissioner of Income Tax vs. Siemens Aktiengesellschaft (2009) 310 ITR 32***. The aforesaid proposition is undisputed. However, in the present case the authorities have come to a finding of fact that no expenditure as claimed of Rs.4.47 crores in respect of purchase of gold coins was incurred. Consequently, there could be no question

of reimbursement of an expenditure not incurred. Therefore, reliance upon the aforesaid decisions does not assist the appellant.

11. We find that the authorities under the Act have rendered a finding of fact and have come to conclusion that no expenditure was incurred in respect of purchase of gold coins and therefore expenditure could not be allowed under Section 37(1) of the Act. The view taken by the authorities is a plausible view.

12. Accordingly, as decision of the authorities are primarily findings of fact, no substantial question of law arises for our consideration.

13. Accordingly, the appeal is dismissed. No order as to costs.

(A.K. MENON,J.)

(M. S. SANKLECHA,J.)