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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER

&

SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA No.135/Mum/2019,ITA No. 136/Mum/2019 & 137/Mum/2019
(**Assessment Years: 2008-09, 2011-12 & 2014-15**)

Maxell Diamond Private Limited 320-A, Panchratna Bldg Charni Road Mumbai-400 004	Vs.	ITO-5(2)(3) 556, Aaykar Bhawan M.K.Road Mumbai-400 020
PAN/GIR No.AAECM8362J		
Appellant)	..	**Respondent**)

Assessee by	None
Revenue by	Smt.Jyothilakshmi Nayak, DR
Date of Hearing	**22/01/2020**
Date of Pronouncement	**29 /01/2020**

आदेश / O R D E R

PER G.MANJUNATHA, Accountant Member:

These three appeals filed by the assessee are directed against separate, but identical orders of the Ld. Commissioner of Income tax (A)-10, Mumbai, all dated 28/09/2018 and they pertains to AY 2008-09, 2011-12 & 2014-15. Since, the facts are identical and issues are common, for the sake convenience, these appeals were heard together and are disposed -off by this consolidated order.

2. The assessee has more or less filed common grounds of appeal for all AY's. Therefore, for the sake of brevity, grounds of appeal filed for AY 2008-09 are reproduced as under:-

> 1. *The ld. AO and CIT(A) erred in making an addition of Rs.57,81,073/- to the total income of the assessee (8% of profit margin embedded to non-verifiable purchase transactions) by treating genuine purchase transactions whose payment is done through account payee cheques in good faith amounting of Rs. 7,22,63,416/- as accommodation entries of non-verifiable purchase from various concerns during the year.*
>
> 2. *Assumption of jurisdiction by the learned Assessing Officer (AO) for the initiating reassessment proceedings u/s 148 of the Act is bad in law in force.*

3. The brief facts of the case are that the assessee company is engaged in the business of trading in cut and polished diamonds, filed its return of income for AY 2008-09 on 26/09/2008, declaring total income of Rs. 1,24,680/-. The assessment has been completed u/s 143(3) of the I.T.Act, 1961 and determined total income at Rs. 2,16,130/-. Subsequently, the case has been reopened on the basis of information received from the DIT(Investigation)-II , as per which, the assessee is one of the beneficiary of accommodation entries of bogus purchases bills obtained from hawala dealers amounting to Rs. 6,61,52,954/- from three parties as listed by the Ld. AO in para 6 of his assessment order. The case was selected for scrutiny and the assessment has been completed u/s 143(3) r.w.s. 147 of the I.T.Act, 1961 on 08/03/2016, determining the total income at Rs. 59,97,203/-, after making additions of 8% profit on alleged bogus purchase from companies controlled and operated by Bhanwaralal Jain group of companies and made additions of Rs. 57,81,073/-.

4. Aggrieved by the assessment order, the assesee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assesee has submitted that the Ld. AO was erred in making additions towards purchases from certain parties, on the basis of statement recorded from them, during the course of search in their cases, ignoring, the fact that the assessee has justified purchase with necessary evidences. The assesee, further, stated that all purchases are genuine and which are recorded in books of accounts. Further, the director of the assessee company had denied the contents of the statement of Rajendra Jain. All transactions were done through proper banking channel. Therefore, merely for the reasons that some parties were not responded to u/s 133(6) notices and also, on the basis of statement of third parties additions cannot be made towards purchases, when assesee has discharged its burden by filing necessary evidences.

5. The Ld.CIT(A) after considering relevant submissions of the assesee and also, taken support from the recommendation from the Task Force group for diamond industry set up by the Government of India, Ministry of Commerce and industry, which after considering the Benign Assessment Process (BAP) scheme recommended a net profit of 2% for trading activity and 3% for manufacturing activity and 2.5% across the board for diamond industry and also by relied upon certain judicial precedents, including the decision of ITAT, Mumbai bench in the case of Renisha Impex Pvt.Ltd. in ITA No. 4464/Mum/2016 and ITA No. 4453/Mum/2016 has uphled additions made by the ld. AO towards 8% profit on alleged non genuine purchases. The relevant findings of the Ld.CIT(A) are as under:

7.3.33 The next contention of the appellant is that addition made by the AO @8% of purchase value is excessive as the global margin of diamond industries is in the range of 1 to 4% and same was accepted by department of commerce. The appellant has placed reliance on judicial precedents and the recommendations of the task group formed under Department of Commerce for diamonds sector in this regard. I have considered the submission of the appellant. It is well known that if purchases are made from open market without insisting from the genuine bills, the suppliers may be willing to sell those products at a much lower rate as compared to the rat at which they may charge in case the dealer has to give a genuine sale invoice in respect of that sale and supply the godos. There may be various factors due to which there is bound to be a substantial difference between the purchase price of unaccounted material and rate of purchase of accounted for goods. Theremay be a saving on account of sales-tax and other taxes and duties which may be leviable in respect of manufacture of sale of goods in question. The suppliers or the manufacturers make a substantial saving in the income-tax also in respect of in respect of income from sale of unaccounted goods produced and sold by them. This may also be one of the factors due to which the seller may be willing to charge lower rates for unaccounted goods as compared to accounted for goods. Thus the motive behind obtaining bogus bills is inflation of purchase price so as to suppress the profits. Therefore, the profit element embedded in such bogus purchase which the assesee could have made, has to be assessed as undisclosed income of the appellant. This being the position, it needs to be determined wht should be the fair profit rate out of the bogus purchases which should be added back to the income of the assessee. The estimation varies with the nature of business and no uniform yardstick can be adopted. Further, the addition will differ from case to case depending upon the facts of the case. In this regard, it may also be observed here tht the CBDT's Insturciton No.2/2008, dated February 22, 2008 lays down guideline in the form of benign assessment procedure for assessee's engaged in diamond manufacturing and/or trading as under:-

> *..the Bengin Assesment Procedure', in the case of assessee engaged in diamond business as announced by Hon'ble Finance Minister in his Budget Speech on 28.08.2007 shall be as under:-*
>
> *A. The procedure will apply to assessee engaged in the business of manufacturing and/or trading of diamonds (referred to below as such business).*
>
> *B. If an assessee has shown a sum equal to or higher than 6% of his total turnover from such business as his income under the head profits and gains of business or profession for a pariutclar assessment year, the Assessing Officer shall accept his trading results.*
>
> *…*
>
> *…*
>
> *…*
>
> *D. The procedure shall not apply to an assessee for an assessment year-*
>
> *..*
>
> *(vi) where there is information regarding escapement of income.*

E. The rate of profit as a percentage of turnover would be reviewed annually on the basis of revenue generation and results of scrutiny assessments, searches and surveys made during the year.

2. The above instruction is issued under section 119(1) of the Income tax Act, 1961 and would be applicable for assessments made during Financial Year 2008-09.

7.3.34 The above recommendations are for computation of income under BAP (Benign Assessment Procedure) i.e. when the assessee opts for BAP and further the above instruction are applicable for assessments made during Financial Year 2008-09. Further, it would not be applicable where there is information regarding escapement of income. However, the persuasive value of the aforesaid instruction cannot be ignored. In the aforesaid instruction it has also been stated that the acceptance of profit at 6% or above as for a particular assessment year will not be a precedent for that assessee or for any other assessee. However, the persuasive value of the aforesaid instruction cannot be ignored.

7.3.35 It is also observed that the Hon'ble ITAT, Mumbai in the decision dated 16.08.2017 in ITA No.3760/Mum/2016 in the case of ITO 5(3)(1), Mumbai vs M/s. Ratnalaya Diamonds Pvt.Ltd. has upheld an addition @6% fo the purchases in the decision dated 1/12/2017 in the case of Ralf Jems Pvt.Ltd. in ITA No. 3707 & 3761, in the decision dated 06/12/2017 in the case of Karp Impex Ltd. in ITA No.6761, 6760,6652,6653 & 6651/Mum/2016, in the decision dated 13/12/2017 in the case of Fancy Diamonds India Pvt.Ltd. in ITA Nos. 47/Mum/2017 & 167/Mum2017 and in the decision dated 08/11/2017 in case of Shikha Diamonds Pvt.Ltd. dated 08/11/2017 in ITA No. 3302/ Mum/2017. Further, in the decision dated 10/01/2018 in the case of Goenka Diamonds & Jewels Ltd. in ITA No. 216 & 153/JP/2014 & 124/JP/2015 the Hon'ble ITAT has sustained an addition @6.5% of the purchase shown from the impugned bogus parties.

7.3.36 The Hon'ble ITAT, Mumbai in the decision dated 19/05/2017 in the case of M/s Dhadda Gems Ltd. vs. ITO 5(1)(3), Mumbai in ITA No. 7310 to 7314 has also sustained an addition @8% of the purchases and in the decision dated 05/02/2018 in the case of M/s Ahimsa Jewellery Mfg. Co. P.Ltd. vs ITO 5(1)(1) , Mumbai in ITA No. 4960/Mum/2017 it ha sustained an addition @12.5% of the purchases shown from the bogus parties, hence the profit embedded in accommodation entries of purchase taken @8% the purchase amount by the AO, which results from the saving on account of sales tax and other taxes and duties which may be leviable in respect of manufacture fo and sale of goods in question, which is transferred to the purchaser, when purchases are made withut genuine bills, cannot be considered excessive. As it is an estimate of the profit embedded in purchase, it cannot be subject to any adjustment on account of any subsequent profit arising from the sale of the materials as held by the Hon'ble ITAT, Mumbai Bench in the decision in ITA No.6555/Mum/2017 for AY 2009-10 in the case of M/s Muhta Markfin (P) Limited Vs. ITO -5(2)(3), has held as under;-

> *"We are of the considered view that as per profit element accounted for by the assesee in its regular books of accounts pertains to the profit which it would have made from selling the goods under consideration, therefore, the same would have no bearing on the qualification of the monetary benefit involved in making of purchases by the assesee at a lower price from the open/grey market, as in comparison to purchases made from registered dealer".*

> *7.3.37 Thus taking in to account the totality of the facts, the profit embedded in accommodation entries of purchase of diamonds, estimated by the AO @8% of the purchase amount is upheld*.

6. None appeared for the assessee. We have heard the Ld. DR, perused the material available on record and gone through orders of the authorities below. We find that the Ld. AO has made additions towards alleged non genuine bogus purchase from certain parties, on the basis of information gathered during the course of search and survey in the cases of Shri. Bhawarlal Jian and his associates and also, on the basis of information received from investigation wing, as per which certain parties were involved in providing accommodation entries of bogus purchase bills to various parties and the assessee being one of the beneficiary of accommodation entry of such bogus purchase bills issued by suspicious dealers/entry providers. The Ld. AO has extensively discussed the issue in light of *modus operandi* used by the entry providers, their statement recorded during the course of search and also inputs gathered during the course of assessment proceedings and came to the conclusion that although, the assesee has filed necessary basic evidence in support of purchases, but failed to file further evidences to prove the purchase to the satisfaction, more particularly in the backdrop of report of investigation wing and the statement of those parties, during the course of survey. It is the contention of the assesee before the lower authorities that purchases from those parties are genuine, which are supported by necessary evidences.

All purchases were recorded in books of accounts. Payments against said purchase have been made through proper banking channels. The Ld. AO neither pointed out any discrepancies in books of accounts, nor made out a case of sales outside books of accounts. In absence of any incorrectness of books of accounts mere, no addition could be made towards alleged non genuine purchases, only on the basis of information collected from third party source, when the assessee has justified purchases with necessary evidences.

7. Having considered the relevant material on record, we find that the Ld.CIT(A) has categorically recorded facts with regard to *modus operandi* of entry providers, in light of their financial statements and came to the conclusion that all those companies are showing high turnover without there being any asset base, which clearly proves the fact that they are involved in providing accommodation entries without there being any actual business activity. The Ld.CIT(A) has also recorded categorical finding that, the findings of the Ld. AO that Shri Bhanwarlal Jain and other entities are engaged in the business of providing accommodation entries is not merely based on their statements recorded u/s 132(4) of the Act, but it is further supported by incriminating material seized during the course of search, which clearly suggest the fact that they are involved in providing accommodation entries. Thus, the findings of the search operations are based not only on the confessional statements of the Bhanwarlal Jain group, but also several other individuals, who are part and parcel of the entire operation of business of the Bhanwarlal Jain group. The Ld.CIT(A), further noted that independent searches have been conducted on few beneficiaries, based on the inputs of the search on the case of entry providers and such beneficiaries have

admitted taking of accommodation entries from the group concerns of entry providers. Therefore, the Ld.CIT(A) came to the conclusion that there is no error in the findings recorded by the Ld. AO to arrive at conclusion that purchases claims to have been made from certain parties are non genuine, which are not supported by necessary evidences. The Ld.CIT(A), further taking note of the fact of diamond industry and its margins and also, taken support from the recommendation of the task force group for diamond industry set up by the Government of India, Ministry of Commerce and Industry, which after considering the BAP scheme recommended a net profit of ranging to 2% to 3% depending upon the nature of the business has uphled additions made by the Ld. AO towards 8% profit on alleged non genuine purchases. Further, although, both authorities have adopted 8% profit on alleged purchase, but no one could support their stand with evidences, except reliance upon the report of task force set up by the Govt. of India, Ministry of Commerce and Industry. But, fact remains that the task force has recommended 2% to 3% profit depending upon nature of trade, whereas the AO as well as the ld. CIT(A) has estimated 8% profit. On the other hand, the co-ordinate bench of ITAT, in the case of Renisha Impex Pvt.Ltd. in ITA No. 4464/Mum/2016 and ITA No. 4453/Mum/2016 has considered an identical issue and directed the AO to estimate 6% profit on alleged non-genuinene purchases. In yet another case, the ITAT, Mumbai Bench in case of M/s Decent Dia Jewel Pvt Ltd, in ITA No. 7080 to 7083/Mum/2018 has taken similar view and estimated 6% profit on alleged non-genuine purchases. We, therefore, considereing facts and circumstances of this case and by following the case laws discussed herein above, direct the ld. AO to estimate 6% profit on alleged non-genuine purchases.

8. In the result, appeal filed by the assessee for AY 2008-09 is partly allowed.

ITA No.136 & 137/Mum/2019:-

9. The facts and issues involved in these two appeals are identical to the facts and issues, which we had considered in ITA No.135/Mum/2019. The reasons given by us in preceding paragraph in ITA No. 135/Mum/2019 shall *mutatis mutandis* apply to these appeals as well. Therefore for detailed reasons recorded in preceding paragraph in ITA No. 135/Mum/2019, we direct the ld. AO to estimate 6% profit on alleged non-genuine purchases. Accordingly, the appeals filed by the assessee for AY 2011-12 and 2014-15 are partly allowed.

10. In the result, all appeals filed by the assessee for AY 2008-09,2011-12 and 2014-15 are partly allowed.

Order pronounced in the open court on this 29 /01/2020

Sd/-	**Sd/-**
(SAKTIJIT DEY)	**(G. MANJUNATHA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated: 29 /01/2020
Thirumalesh Sr.PS

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.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai