

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'A' JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 117/JP/2019
निर्धारण वर्ष/Assessment Year :2012-13

Abhay Chordia 4459 KGB Ka Rasta, Johari Bazar, Jaipur	बनाम Vs.	DCIT, Circle-02, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ADLPC7128H		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से/ Assessee by : Sh. M. L. Borad (Adv.)
राजस्व की ओर से/ Revenue by : Ms Chanchal Meena (JCIT)

सुनवाई की तारीख/ Date of Hearing : 27/02/2020
उद्घोषणा की तारीख/Date of Pronouncement: 28/04/2020

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-1, Jaipur dated 22.11.2018 wherein the assessee has taken the following grounds of appeal:-

- "1. That the additions of Rs. 1,92,926/- [being 25% of alleged unverifiable purchases of Rs. 7,71,704/- made by assessee from M/s Rose Impex] in Unit-1, Non-SEZ sustained by the learned CIT(A) is most arbitrary and unjust and in the alternative excessive w.r.t facts and circumstances of the case.*
- 2. That the additions of Rs. 4,26,419/- sustained by the learned CIT(A) in Unit-II SEZ by estimating GP rate of 29.25% against GP rate of 28.85% declared by the assessee is most arbitrary and unjust and in the alternative excessive w.r.t. facts and circumstances of the case.*

3. That the learned AO erred in sustaining disallowance of Rs. 1,00,000/- out of indirect expenditure by apportioning the total indirect expenditure between non-SEZ unit and SEZ Unit on the basis of total turnover of the units, which disallowance of Rs. 1,00,000/- is most arbitrary and unjust and in the alternative excessive w.r.t facts and circumstances of the case."

2. In Ground No. 1, the assessee has challenged the sustenance of additions of Rs.1,92,926/- made by the AO by way of disallowing 25% of alleged unverifiable purchases of Rs.7,71,704/- made by assessee from M/s. Rose Impex in his non-SEZ unit, namely, Ashok Jewels – Unit-I.

3. In this regard, the Id. AR submitted that the sales in above said Unit-1 is of Rs.14,27,85,791/- and this turnover is export turnover. The total purchases of this Unit-I is of Rs.9,72,65,328/-. These total purchases of Unit-I of Rs.9,72,65,328/- includes alleged unverifiable purchases of Rs.7,71,704/- made by assessee from above named M/s. Rose Impex. These alleged unverifiable purchases of Rs.7,71,704/- are simply 0.8% of total purchases and as such very little seeing the volume of total purchases of Unit-I which are of Rs.9,72,65,328/- and seeing the volume of the business, total sales being export sales and fully verifiable, the sale proceeds having been received in foreign exchange through proper banking channels, the learned AO as well as the learned CIT(A) should have ignored the issue of alleged unverifiable purchases and no addition whatsoever should have been made by the AO nor it should have been upheld by the learned CIT(A).

4. It was submitted by the Id AR that for every sale, there has to be a purchase and without purchase, there can't be sales and particularly export sale. The AO has also admitted the declared turnover. When sales are admitted there is no reason to suspect a negligible amount of purchase which too duly supported by sale invoice, duly recorded in stock register, payment to seller having been made through proper banking channels and the goods purchased

from above named party, namely, Rose Impex, having directly been exported by Unit-I of M/s. Ashok Jewels.

5. It was submitted by the Id AR that the assessee has kept and maintained individual trading account of different precious and semi precious stones in terms of weight and value and no kind of leakage or irregularity in these individual trading accounts have been mentioned by the AO in the assessment order. That day to day stock register has been maintained by assessee for every item traded by him and all the record including stock register was duly produced before the AO in the assessment proceedings. That complete quantitative details as well as detailed and complete inventories of opening and closing stock stood filed before the AO. That the burden of proof of not accepting the apparent as real lies on the AO but he has failed to discharge this burden of proof. So much so the AO has not given a single instance of layering of funds or circulation of funds or returning by the seller in cash the amount of cheque given by the assessee to him in lieu of goods purchased by him.

6. In Ground No. 2, the assessee has challenged the addition of Rs.4,26,419/- sustained by the learned CIT(A) out of the total addition of Rs.9,86,115/- (25% of unverifiable purchases of Rs.39,44,460/-) made by the AO in the SEZ unit, namely, Ashok Jewels – Unit-II of the assessee.

7. It was submitted by the Id AR that the following observations made by the learned CIT(A) while sustaining addition of Rs.4,26,419/- is unjustified and not maintainable in law:

"After considering the addition of Rs.9,86,115/- (25% of unverifiable purchases) made by the AO, the gross profit of SEZ unit becomes 29.78% which is high in comparison to average gross profit rate of 28.80%. Therefore, in view of the totality of facts, component of unverifiable purchase in total purchase and circumstances of the case, in my considered opinion, it would be appropriate to estimate the GP rate

at 29.25%, which would result in gross profit of Rs.3,09,49,178/- against gross profit of Rs.3,05,22,759/- shown by the appellant, thereby resulting in trading addition of Rs.4,26,419/-. The higher gross profit will also take into account of the irregularities committed by the appellant in obtaining accommodation entries. Hence, the addition made by the AO is restricted to Rs.4,26,419/-."

8. It was submitted by the Id AR that the learned CIT(A) failed to appreciate that the Hon'ble Rajasthan High Court in last 3-4 years have more than once held that while applying GP rate for estimating the gross profits, the average gross profit rate of the assessee in past years should be taken into account. In appellant's case average GP rate of preceding year is 28.80%. It was submitted that the GP rate of the year under appeal is 28.85% which is higher than the average GP rate of past years. It was submitted that GP rate being above the average GP rate of past years, book results should have been accepted by the lower authorities and no amount of addition should have been sustained by the learned CIT(A).

9. It was further submitted by the Id AR that the learned AO as well as learned CIT(A) failed to appreciate that the alleged unverifiable goods of total amount of Rs.39,44,460/- purchased by the appellant from two selling dealers, namely, A2 Jewels and M/s. Mouli Gems at Rs.4,43,460/- and Rs.35,01,000/- respectively were used in manufacturing by the SEZ Unit and such manufactured goods were exported. That the assessee has kept and maintained full record in terms of weight of the rough purchased, rough put to manufacturing, finished goods manufactured out of manufacturing operations, wastage occurred during manufacturing, yield, labour charges paid to various karigars and all these record was produced before the AO more than once. The learned CIT(A) failed to appreciate that assessee's sole proprietary business concern M/s. Ashok Jewels Unit-II is situated in SEZ Industrial Area, Sitapura, Jaipur. As per SEZ Rules and Regulations, all the goods before entry in SEZ i.e. factory premises of the assessee in SEZ are verified by customs authorities of

Government of India. After due verification of the goods to be entered in the factory premises the custom authorities put their rubber seal and signature and only after completion of all these compliances the goods are allowed to be entered in the factory premises. In such a situation there is no question of involving of assessee in accommodation entries. That for every sale there has to be a purchase and without purchase there can't be sales and particularly export sale. When sales are admitted there is no reason to suspect the purchases made by the assessee particularly from above named parties. Copy of purchase invoices stand already filed before the AO and there is no dispute regarding the purchase bills. That detailed exhaustive stock register has been maintained for each and every item manufactured in the SEZ Unit i.e. Ashok Jewels, Unit-II and the same was produced before the AO. That complete quantitative details as well as detailed and complete inventories of opening and closing stock stood filed before the AO. That the burden of proof of not accepting the apparent as real lies on the AO but he has failed to discharge this burden of proof. So much so the AO has not given a single instance of layering of funds or circulation of funds or returning by the seller in cash the amount of cheque given by the assessee in lieu of goods purchased by him.

10. Per contra, the Id DR submitted that the AO had received the information from the Investigation wing of the Department that the appellant has taken accommodation entry amounting to Rs. 40,22,164/- from a number of entities controlled and managed by Shri Bhanwar Lal Jain and others, entry operators of Mumbai, in whose case a search was conducted by the income tax department, wherein, it was admitted by him that he was in the business of providing accommodation entries. In the assessment order, it was concluded by the AO that the appellant has tried to deflate its profits by arranging bogus purchase bills without actual delivery of goods and consequently, the AO has made trading addition of Rs. 11,79,041/- to the income of the appellant, being 25% of bogus purchased of Rs. 47,16,164/-.

11. It was further submitted that the appellant has declared total turnover of Rs. 14,27,85,791/- in non SEZ unit and turnover of Rs. 10,58,09,156/- in SEZ unit. The AO has not disputed the sales made by the appellant and thus, the purchases must have been made for making the sales. The AO has doubted the genuineness of the purchases on the ground that the suppliers were found to be accommodation entries providers and the purchases from entities controlled by Shri Bhanwar Lal Jain could not be verified during the assessment proceedings.

12. It was further submitted that the books of accounts of the appellant have been rejected by the AO u/s 145(3) of the Act as the appellant could not substantiate the real delivery of goods from the entities controlled by entry provides providing accommodation purchase bills and thus, the trading results of the appellant were not verifiable. Thus, the rejection of books of accounts by the AO was also upheld by the Id CIT(A) and thereafter, he has estimated the gross profit rate. It was accordingly submitted that there is no infirmity in the order of the Id CIT(A) and the same should be confirmed.

13. We have heard the rival contentions and pursued the material available on record. In this case, the books of accounts have been rejected u/s 145(3) by the Assessing officer which is sustained by the Id CIT(A) and the assessee is not in appeal against the rejection of books of accounts. The only issue under consideration therefore is once the books of accounts are rejected, what should be the reasonable gross profit rate which can be estimated in the hands of the assessee. It is an admitted position of both the parties that the past history of the assessee can be taken as a reliable basis for estimating the gross profit rate.

14. We find that in terms of non-sez unit, Id CIT(A) has taken note of the fact that as against the average gross profit of past years which comes to 3.72%, the assessee has declared G.P of 3.12% and where the addition so made by the AO is considered, the effective current year G.P will come to 3.60%. He accordingly has sustained the addition made by the AO and

effectively upheld the gross profit rate of 3.60% which is closer though lower than average gross profit rate. The Revenue is not in appeal and we see no reason to interfere with the said findings of the Id CIT(A) and the same are hereby sustained. In the result, the ground no. 1 of assessee's appeal is dismissed.

15. In terms of SEZ unit, Id CIT(A) has taken note of the fact that as against the average gross profit of past years which comes to 28.80%, the assessee has declared G.P of 28.85% and where the addition so made by the AO is considered, the effective current year G.P will come to 29.78%. However, given the component of unverifiable purchases, he has estimated the gross profit rate of 29.25%. We find that once the past year results are taken as a reliable basis for estimating the gross profit and such results have attained finality and where the assessee has disclosed better gross profit rate than the past years results, gross profit so declared should be accepted and the same cannot be disturbed applying the same basis pursuant to which the books of accounts have been rejected. The addition of Rs 4,26,419/- so sustained by the Id CIT(A) is hereby set-aside. In the results, the ground no. 2 of assessee's appeal is allowed.

16. In Ground No. 3, the assessee has challenged sustenance of disallowance of expenses of Rs.1,00,000/- by the learned CIT(A) by applying theory of apportionment of expenses in regard to indirect expenses claimed in Unit-I (Non-SEZ) and Unit-II (SEZ unit claiming exemption of income).

17. It was submitted by the Id AR that all these expenses are incidental to and directly related to the business and as such no disallowance can be made. All the above referred expenses have been incurred in the course of carrying on of regular business activities. Full details of all these expenses stands filed with the A.O. in the course of assessment proceedings. All supporting evidence in the form of invoices and vouchers duly signed by the concerned persons were produced before the A.O. in the course of assessment proceedings. The

learned AO has not pointed any specific defects in the books of accounts nor in the nature of expenses or supporting evidence for making disallowances. There is a consensus of judicial opinion that an expenditure necessary for earning an income is an allowable expenditure. The learned AO has not given any specific reason as to why he is making disallowance of the expenses and as to how these expenses are not related to the carrying on of regular business activities.

18. In support, reliance was placed on the Hon'ble Supreme Court decision in the case of Alluminium Corporation of India Ltd. Vs. CIT [1972] 86 ITR 11 [SC] and various other similar decisions wherein it is held that where an expenditure is incurred for commercial expediency, the same shall be allowed as deduction u/s.37(1) of the I.T. Act. The Hon'ble Supreme Court further held that if at the time the expenditure is incurred commercial expediency justifies it, it will be taken to be for the purpose of the business even though not supported by any prevailing practice. The assessee has furnished before the A.O. day-to-day details of the above mentioned expenses. It was submitted that every expenditure incurred by the assessee is backed by supporting evidence in the nature of bill and voucher. The A.O. has not pointed out a single item of inadmissible nature nor has he pointed out that it is not backed by supporting evidence nor has he pointed out that such and such expenditure is not incurred in the course of regular business activity nor has he pin pointed that such and such expenditure is of capital nature or of personal nature nor has he pointed out that such and such expenditure is not incidental to business. The AO has not given a single instance where an expenditure incurred by SEZ Unit has been debited as expenditure in non-sez unit. The observation of the A.O. in last para of page 17 of the impugned assessment order which reads as "it is pertinent to mention here that both the units of the assessee are being operated from Jaipur and engaged in the similar line of business and expenditure incurred is also same. Therefore, it is quite possible that the assessee has diverted its expenditure of SEZ unit to Non SEZ unit to avoid the tax liabilities from Non SEZ Unit. In these circumstances, it is reasonable to

apportionment the total indirect expenses in the ratio of turnover of both the Units" is in fact far away from truth and based on surmises and conjectures. It is submitted that Income tax Act 1961 as well as related laws never support the actions based on hypothetical grounds. In this regard the assessee rely on the following judgments:

- Dharkeshwari Cotton Mills Ltd. Vs. CIT 26 ITR 775
- Omar Salay Mohammed Vs. CIT 37 ITR 151
- Lal Chand Bhagat Ambica Ram Vs. CIT 37 ITR 288

19. Without prejudice to above submissions and in the alternative, it was submitted that while making disallowance of expenses by adopting theory of "apportionment", the AO has also included following expenses totalling to Rs.5,71,727/- which clearly and conspicuously have been exclusively incurred by the SEZ Unit and no such expenditure has been incurred by the Non-SEZ Unit and as such while using theory of apportionment, these expenses should be deducted from the gross total expenses of both units totalling to Rs.56,93,090/- and only net resultant amount of Rs.51,21,363/- [gross total of indirect expenses of both units Rs.56,93,090/- minus expenses exclusively incurred by the SEZ Unit Rs.5,71,727/-] should have been considered for apportionment purposes. The details of such expenses are as under:

1. Building Rent	1,63,800
2. Conveyance(Bus) of Staff	2,40,000
3. Freight & Cartage	7,900
4. Repairs & Maintenance of Building	1,60,027
5. Tunc Exp.	1,000

20. Per contra, the Id DR submitted that the appellant is engaged in the business of manufacturing and export of precious and semi precious gem stones. It has two units one domestic and otehr SEZ unit situated in Sitapura Industrial area being 100% EOU. In non SEZ unit, the appellant has shown net

profit rate of 2.34% while in SEZ Unit, it has show net profit rate of 26.51%. The AO has apportioned the total indirect expenditure between non SEZ unit and SEZ unit on the basis of total turnover of the units. While apportioning the expenditure, the AO has mentioned that:

"Perusal of trading and P/L account reveals that the assessee has declared net profit of Rs 33,40,061/- on turnover of Rs 14,27,85,791/- declaring NP Rate of 2.34% from its non – SEZ unit i.e, Unit-1. In the SEZ unit i.e Unit-II which is engaged in the similar business, the assessee has declared net profit of Rs. 2,80,54,120/- on total turnover of Rs. 10,58,09,157/- declaring NP rate of 26.51%. It is clear that the assessee from his two different Units engaged in the similar line of business declared very low NP rate from its Non SEZ unit & very high NP rate from its SEZ Unit. From analysis of P/L account revealed that assessee debited indirect expense of Rs. 34.90 lacs on total turnover of Rs. 14.28 crores from Non SEZ unit but in the SEZ unit the assessee debited 22.02 lacs on total turnover of Rs. 10.68 crores.

Analysis of details given above clear that the assessee has shown less profit from non SEZ Unit as the same is not exempt from tax of the other hand the exempt income from SEZ Unit is shown at higher rate.

It is pertinent to mention here that both the units of the assessee are being operated from Jaipur and engaged in the similar line of business and expenditure incurred is also same. Therefore, it is quite possible that the assessee has diverted its expenditure of SEZ unit to non SEZ unit to avoid the tax liabilities from Non SEZ unit. In these circumstances, it is reasonable to apportionment the total indirect expenses in the ratio of turnover of both the units."

21. After considering the submission of the appellant and the facts of the case, it is noted that the AO has apportioned whole of the indirect expenditure without indentifying specific instances of debiting inter unit expenditure. It is

noted that the appellant has debited travel expenses of 4,15,363/- in non SEZ unit while Rs. 2,35,248/- in SEZ unit. As SEZ unit is 100% export oriented, the foreign travel expenses are bound to be more in SEZ unit than in non SEZ unit. In absence of specific details of travelling and its benefit to different units some disallowance is justified. Considering the totality of facts, the disallowance made by the AO out of total expenditure is restricted to Rs. 1 lac. The appellant gets relief of Rs. 1,02,421/-.

22. We have heard the rival contentions and pursued the material available on record. The issue is limited to the basis of apportionment of common indirect expenses which have been claimed by the assessee in respect of its two units where one of the units is eligible for tax holiday being located in a SEZ area and other unit located in a domestic tariff area. The AO has apportionment the whole of the common indirect expenses in the ratio of turnover of the respective units and has disallowed Rs 2,20,421/- in respect of non-SEZ unit. The Id CIT(A), while accepting the basis of such apportionment, has held that since the said apportionment has been done by the AO without identifying specific instances of inter-unit in other words, common expenditure, the disallowance so made is restricted to Rs 1,00,000/-. Further, during the course of hearing, the Id AR submitted that there are certain expenditure totaling to Rs 571,727/- of total expenditure of Rs 56,93,090/- which are exclusively incurred by the SEZ unit and are thus not in the nature of common indirect expenditure and the same should be excluded while applying the apportionment formula. In our view, where common indirect expenditure has been incurred by the assessee and which has either not been incurred by a specific unit or cannot be indentified to a specific unit, applying the turnover basis for apportioning such expenditure is reasonable and we donot see any basis to disturb the said allocation basis in absence of any other basis so highlighted by the assessee. However, as far as claim of expenditure exclusively incurred by the SEZ unit, we agree with the contention of the Id AR. The matter is accordingly set-aside to the file of the AO to verify and exclude

expenditure totaling to Rs 571,727/- which is claimed by the assessee as specifically incurred by the SEZ unit while apportioning the common indirect expenditure and recompute the disallowance accordingly. The ground is thus allowed for statistical purposes.

In the result, appeal of the assessee is partly allowed.

Order pronounced on 28/04/2020.

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 28/04/2020

*Ganesh Kr.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Abhay Chordia, Jaipur
2. प्रत्यर्थी / The Respondent- DCIT, Circle-02, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 117/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar