आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ, "बी" चण्डीगढ़

IN THE INCOME TAX APPELLATE TRIBUNAL DIVISION BENCH, 'B' CHANDIGARH

श्री संजय गर्ग, न्यायिक सदस्य एवं श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND Ms. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA Nos. 398 to 401/CHD/2019**

निर्धारण वर्ष / Assessment Years : 2009-10 & 2012-13

M/s Radhe Sham Jain Diamond Jewellers Pvt Ltd., B-XIX, 549/1, College Road, Fountain Chowk, Civil Lines, Ludhiana	बनाम	The DCIT, Central Circle - III Ludhiana
स्थायी लेखा सं./PAN NO: AADCR8437J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Rajeev Gupta, CA

राजस्व की ओर से/ Revenue by : Smt. Anita Meena, JCIT

सुनवाई की तारीख/Date of Hearing : 04.02 2020

उदघोषणा की तारीख/Date of Pronouncement : 28.02.2020

आदेश/Order

Per Sanjay Garg, Judicial Member:

The captioned appeals for four consecutive assessment years 2009-10 to 2012-13 have been preferred by the assessee against the separate orders dated 16.01.2019 of the Commissioner of Income Tax (Appeals)-5, Ludhiana [hereinafter referred to as 'CIT (A)]' raising identical grounds.

2. Since the facts and issue involved in all the appeals are identical, hence, the same were heard together and are being disposed of by this common order.

3. The assessee's appeal for **assessment year 2012-13 bearing ITA No.401/Chd/2019** is taken as a lead case for the purpose of discussion.

<u>ITA No. 401/Chd/2019(A.Y. 2012-13)</u>

4. The assessee in this appeal has taken the following grounds of appeal:-

> 1. *That the Hon'ble CIT (A)-5 has erred in rejecting the additional ground of appeal that the re-assessment is liable to be quashed on the ground that the statutory notice u/s 143(2) was not served on the assessee.*
>
> 2. *That the Hon'ble CIT (A]-5 has erred in rejecting the additional ground of appeal that the addition has been made by the AO without rejecting the books of account u/s 145(3) of the Income Tax Act, 1961.*
>
> 3. *That the Hon'ble CIT (A)-5 has erred in confirming the addition of Rs. 128996/- on account of G.P. on so called Bogus Purchases for Rs. 2149920/- and further enhancing the addition to Rs. 2149920/-, which is against the law and facts.*
>
> 4. *That the Hon'ble CIT (A)-5 has erred in dismissing the plea of the assessee for quashing the reopening of assessment under section 147 of the Income Tax Act, 1961.*

5. That the Appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off.

5. **<u>Ground No.1</u>** : The assessee vide ground No.1 has contested the validity of the assessment framed u/s 143(3) read with section 147 of the Income Tax Act, 1961 on the ground that statutory notice u/s 143(2) was not issued or served upon the assessee. The Ld. Counsel in this respect has placed reliance on the copies of the assessment records / order sheet of the assessment proceedings, which is placed at pages 7 to10 of the paper book.

6. We have gone through the said order sheet entries and find that there is no mention in any of the orders of the Assessing Officer of different dates relating to the assessment proceedings carried out in the case of the assessee of issuance of any notice u/s 143(2) of the Income Tax Act.

7. The Ld. DR, after perusal of the record has fairly agreed that in this case no notice u/s 143 (2) was issued by the Assessing Officer to the assessee either before or during the framing of the assessment u/s 143(3) of the Act. The Ld. Counsel for the assessee has submitted that the issue is very well settled on this point that even to assume jurisdiction by the Assessing Officer to frame reassessment u/s 143(3) read with section 147 of the Act, statutory notice u/s 143(2) is

mandatorily required to be issued. The Ld. Counsel in this respect has made the following submissions:-

Ground of appeal No.	Assessing Officer's Findings	CIT(A)'s Findings	AR submissions.
1. That the Hon,ble CIT(A)-5 has erred in rejecting the additional ground of appeal that the re-assessment is liable to be quashed on the ground that the statutory notice u/s 143(2) was not served on the assessee.	*Re-assessment order passed* **without issuing statutory notice u/s** *143(2) of the Act.*	*Dismissed the assessee's gound by taking plea of section 292BB.* **Para no.***4.6* **at** *page* **no.***15*	*- Here issue is not regarding service of notice but in fact no notice issued u/s 143(2) at all during the re-assessment proceedings. Copy of* **order sheet** *placed at PB folio 7-10. Also para 1 of assessment order is self explanatory i.e. no notice issued u/s 143(2) of the Act.* *- Hon'ble Apex Court in the case of* **CIT vs. Laxman Dass Khandelwal** *held; in para 9, the section i.e. 292BB* **is not intended to cure complete absence of notice itself.** *- Hon'ble Delhi High Court in the case of* **PCIT vs. Jai Shiv Shankar Traders Pvt. Ltd.** *Held; in para 19,* **the failure by the AO to issue a notice to assessee u/s** *143(2) after filing the return pursuant to a notice issued u/s 148 of the Act, is fatal to the order of reassessment.* *- Hon'ble Rajasthan High Court in the case of* **PCIT vs. Kamla Devi Sharma** *held; in para no.18 same finding i.e.,* **the failure by the AO to issue a notice to assessee u/s** *143(2) after filing the return pursuant to a notice issued u/s 148 of the Act, was fatal to the order of re-assessment.* *- Hon'ble Delhi High Court in the case of* **PCIT vs. Silver Line & ANR.** *Held; in para 23,* **that a re-assessment order cannot be passed without compliance with the mandatory requirement of notice being issued by the AO to the assessee under section u/s** *143(2)* **of the Act** *- Hon'ble Madras High Court in the case of Sapthagiri Finance & Investments vs.* ITO *held; in para no.13 i.e.* we *are of the view that in completing the assessment under section* 148 *of the Act, compliance of the procedure laid down under sections* 142 *and* 143(2) *is*

			mandatory. - *Hon'ble P&H High Court in the case of* CIT *vs. Cebon India Ltd. Held; in para no.5, Absence of notice cannot* be *held to* be *curable under* S.292BB *of the Act.* - *Hon'ble ITAT Chandigarh in the case of Sanjeev Aggarwal vs.* DCIT *Held; in para 10 last lines i.e.* We *hereby quash the order of the Assessing officer, which was made without issue of notice u/s* & 143(2) *of the Act.*

8. The Ld. DR, on the other hand, has relied upon the provisions of section 292BB of the Act to submit that if the assessee has not raised any objection of service of notice, appeared in any proceedings or cooperated in an enquiry relating to the assessment or re-assessment and no objection has been raised regarding the service of notice upon him, such assessee is precluded from taking any objection in this respect at a later stage. The Ld. DR in this respect has also relied upon the decision of the Hon'ble Punjab & Haryana High Court in the case of 'Josh Builders and Developer (P) Ltd. vs PCIT' (2016) 389 ITR 314(P&H).

9. In rebuttal, the Ld. AR of the assessee has submitted that the case law relied upon by the Revenue of Hon'ble High Court of Punjab & Haryana in the case of 'Josh Builders & Developers (P') Ltd. vs PCIT' (supra) is regarding the validity and service of notice issued u/s 143(2) of the Act, while in the present case there is complete absence of notice u/s 143(2) i.e no notice was issued at all either before or after filing of the return in response to notice issued u/s 148 of the Act. It was,

therefore, submitted that the said decision is not applicable to the facts and circumstances of the case.

10. We have considered the rival contentions and have also gone through the record. So far as the reliance of the Ld. DR upon the provisions of section 292BB of the Act is concerned, the issue is now well settled by the Hon'ble Supreme Court in the case of 'CIT vs Laxman Dass Khandelwal' Civil Appeal No. 6261-6262 of 2019 decided vide order dated August 13, 2019, wherein, the Hon'ble Supreme Court in para 8 to10 of the order has observed as under:-

> *"8. The law on the point as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in Blue Moon's case. The issue that however needs to be considered is the impact of Section 292BB of the Act.*
>
> *9. According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that die Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.*
>
> *10. Since the facts on record are clear that no notice undersection143(2) of the Act was ever issued by the Department, the findings rendered by the High Court and the Tribunal and the conclusion arrived at were correct. We, therefore, see no reason to take a different view in the matter."*

The Hon'ble Supreme Court, thus, has categorically held that section 292 BB is not indeed to cure complete absence of notice itself. So far as the mandatory requirement of issue of notice u/s 143(2) of the Act in the case of re-assessment proceeding carried out u/s 147 of the Act is concerned, the issue has been settled by the Hon'ble Delhi High Court in the case of 'PCIT vs Jai Shiv Shankar Traders Pvt Ltd.' (2016) 383 ITR 448 (Delhi), wherein, the Hon'ble Delhi High Court held that the failure of the Assessing Officer to issue a notice to the assessee u/s 143(2) of the Act subsequent to the filing of the return pursuant to the notice issued u/s 148 of the Act is fatal of the order of the re-assessment. In view of this, the assessment / re-assessment framed by the Assessing Officer u/s 143(3) of the Act read with section 147 of the Act is liable to be quashed. We order accordingly. In view of this, the consequential addition pursuant to such invalid assessment framed will have no legs to stand and are accordingly ordered to be deleted.

11. In view of our findings given above on the legal issue, the grounds taken by the assessee on merits have become academic in nature. However, for the sake of completeness, the grounds on merits are also dealt with.

12. **Ground Nos 2 & 3**: Vide ground Nos. 2 & 3, the assessee has agitated the confirmation of addition of Rs. 1,28,996/- on account of

GP rate applied on alleged bogus purchases and further, the enhancement to the addition by the CIT(A) of Rs. 21,49,920/- pleading that such an addition was not warranted as neither any defect in the books of account of the assessee were pointed out nor the books of account were rejected u/s 145(3) of the Act. That even the alleged bogus purchases have been presumed by the lower authorities without there being any evidence of such bogus purchases. The Ld. AR of the assessee in this respect has made the following submissions:-

Ground of appeal No.	**Assessing Officer's Findings**	**CIT(A)'s Findings**	**AR submissions.**
2. *That the Hon'ble* **CIT** *(A)-5 has erred in rejecting the additional ground of appeal that the addition has been made by the AO without rejecting the books of account u/s* 145(3) *of the Income Tax Act,* 1961.	*In re-assessment books were not rejected by AO*	*Para* **4**.*5 at page no.15 of CIT(A) order held; The addition has been made by the AO on the basis of this information and for doing so, there was no requirement to reject the books of accounts u/s 145(3) because apart this item, no other addition has been made during the^ re-assessment proceedings.*	*-There is no other adverse finding except information from investigation wing.* *-Assessee is an trading concern and supplied the day to day stock register of diamonds during re-assessment proceedings at PB folio 53 to71 showing the receipt from Nazar Impex as well as sale of diamonds.* *- Even books rejected u/s 145(3) in original assessment were not upheld by the CIT(A) as well as Hon'ble Chandigarh Tribunal (Copy enclosed, para 11 at page no.7 of the ITAT's Order)* *- Sales as well as value in closing stock in respect of the purchases from Nazar Impex were accepted by the Revenue, thus the purchases can not be disallowed without rejecting books of accounts in the case of trading concern.*
3. *That the Hon'ble* CIT *(A)***-5** *has erred in confirming the addition of Rs.* 128996/- *on account of G.P. on so called Bogus Purchases for* Rs. **2149920/- and further enhancing**	*There is no other adverse finding except information from investigation wing.*	*Para 4.2, 8th line from below of page 13 of CIT(A)'s order; Since the items do not have specific identity number, hence it cannot be*	*-Bogus purchases not established by the AO.* -**PB** ***folio*** **42**; *if purchase of diamonds excluded from purchases as well as stock in trade, it results to loss of Rs.20,16,844/-, cannot be said that assessee made efforts to reduce the profit.* *- Hon'ble Apex Court in the case of*

the addition to Rs. 2149920/-, which is against the law and facts.		*verified whether the diamonds shown as purchased from Nazar Impex were included in the stock and only those particular items have been sold and included in sales declared by the assessee.* *Para 4.2,19th line from top of the page no.14; As the assessee has debited the amount of purchase from Nazar Impex in the trading account* ***this has led to suppression of the profit to the extent of bogus purchases.***	**PCIT** ***vs. Tejua Rohit kumar Kapadia*** **(PB** ***folio*** **3** ***to*** **6)** *held; in para 3, the purchases were duly supported by bills and payment were made by account payee cheque, conformation of transactions, no evidence that the amount was recycled back to assesssee, particularly trader had also shown sales out of purchases made, which were accepted by Revenue. No question of law arises.* **-Confirmation u/s 133(6) is placed at PB folio 11 to 32.** *-Hon'ble Bombay High Court in the case of* **PCIT vs. Paramshakti Distributors Pvt. Ltd. Concl;** *Where AO has not rejected either purchases or the sales made out of the said purchases, it is allowed to apply the principle of taxing the profit embedded in such purchases covered by bogus bills, instead of disallowing the entire expenditure.* *- Hon'ble Bombay High Court in the case of* **PCIT vs. Pinaki D. Panani,** *allowed to apply the principle of taxing the profit embedded in such purchases covered by bogus bills, instead of disallowing the entire expenditure.*

13. The Ld. DR, on the other hand, has submitted that the Assessing Officer has relied upon the report of the Investigation Wing that the assessee was involved in bogus purchases. Further, the Ld. DR has relied upon the observation of the CIT(A) made in para 4.2 at page 13 of the impugned order of the CIT(A) to submit that the Ld. CIT(A) has observed that items do not have any specific identify number, hence, it cannot be verified whether the diamonds shown as purchased from M/s Nazar Impex Pvt Ltd. were included in the stock and that the same have been included in the sales declared by the assessee.

14. In rebuttal, the Ld. Counsel for the assessee has relied upon page 50 of the paper book to submit that assessee had duly submitted the relevant details not only during assessment proceedings but also during re-assessment proceedings. Page 50 is the copy of the letter dated 29.12.2019 submitted to the Assessing Officer during the re-assessment proceedings, point 9 of which is relevant, which for the sake of convenience is reproduced as under:-

> *"Copy of account with M/s Nazar Impex Pvt. Ltd. is enclosed. It is pertinent to mention here that during the assessment proceedings assessee had provided the complete particulars of Purchases, Sales, Item wise quantative details, Stock Register, Trading account of diamond, Date wise movement of diamonds etc. Ld. AO. also had verified the same. Confirmation from the party is on record. Even on the date of search i.e. 14.03.2012 physical stock summary had prepared and there was negligible difference in stock of diamonds, as per books of accounts. Which also had duly surrendered and tax already paid on the same. Please find enclosed the following documents in support of our submissions, which are already given during the assessment proceedings and are on record :-*
>
> *(i) Detail enclosed with reply dt 12.09.2013.*
> *(ii) Diamond Purchase Ledger.*
> *(iii) Diamond Sale Ledger.*
> *(iv) Diamond Trading A/c.*
> *(v) Diamond Stock Register.*
> *(vi) Valuation report dt 14.03.2012.*

15. A perusal of the above details along with documents attached with the paper book reveals that the assessee has submitted the complete particulars of purchase / sales, item-wise quantitative details, stock

register, trading account of diamond and date wise movement of diamond. The details noted above were also submitted during the re-assessment proceedings. From the above, it is duly proved that the entire details were submitted by the assessee. The Assessing Officer without any verification of any of the details submitted by the assessee and even without verification from the concerned seller 'M/s Nazar Impex Pvt Ltd.' made the additions without application of mind merely on the basis of the some investigation report from the Director General (Investigation),Mumbai which on stand-alone basis without corroboration with any of the facts of the case of the assessee cannot be made the sole basis to hold that the assessee had made bogus purchases. Moreover, the Ld. Counsel for the assessee has demonstrated that if the alleged bogus purchases and corresponding sales are ignored or excluded, there will be a resultant loss of Rs. 20,16,844/- and under the circumstances, it cannot be said that the assessee had booked bogus purchases to reduce the profits. Moreover, when the sales have been admitted and there is sufficient profit shown by the assessee on such sales and even without any iota of evidence on the file that the assessee was indulged in bogus purchases, the lower authorities were not justified in making / confirming the impugned additions. Moreover, no defect has been pointed out in the books of account of the assessee and even the books of account have not been rejected by the Assessing Officer.

In view of this, grounds Nos. 2 & 3 are allowed in favour of the assessee.

16. **Ground No.4:** At the outset, the Ld. Counsel for the assessee has submitted that he does not press ground No.4 of the appeal, hence, is same is dismissed as not pressed.

17. In view of our findings given above on ground No.1, re-assessment is quashed and, therefore, the consequential additions made by the Assessing Officer have no legs to stand and the same are also accordingly ordered to be deleted. Even on merits, in view of our findings given above, the additions made by the Assessing Officer are not sustainable.

18. Now coming to the assessee's appeals for assessment years 2009-10 to 2011-12, wherein, the assessee has taken following grounds of appeal:-

ITA No. 398/Chd/2019 (A.Y. 2009-10):-

1. *That the Hon'ble CIT (A)-5 has erred in rejecting the additional ground of appeal that the re-assessment is liable to be quashed on the ground that the statutory notice u/s 143(2) was not served on the assessee.*

2. *That the Hon'ble CIT (A)-5 has erred in rejecting the additional ground of appeal that the addition has been made by the AO without rejecting the*

books of account u/s 145(3) of the Income Tax Act, 1961.

3. *That the Hon'ble CIT (A)-5 has erred in confirming the addition of Rs. 116610/- on account of bogus purchases for Rs. 1943495/- and further enhancing the addition to Rs. 1943495/-, which is against the law and facts.*

4. *That the Hon'ble CIT (A)-5 has erred in dismissing the plea of the assessee for quashing the reopening of assessment under section 147 of the Income Tax Act, 1961.*

5. *That the Appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off.*

<u>ITA No. 399/Chd/2019 (A.Y. 2010-11):-</u>

1. *That the Hon'ble CIT (A)-5 has erred in rejecting the additional ground of appeal that the re-assessment is liable to be quashed on the ground that the statutory notice u/s 143(2) was not served on the assessee.*

2. *That the Hon'ble CIT (A)-5 has erred in rejecting the additional ground of appeal that the addition has been made by the AO without rejecting the books of account u/s 145(3) of the Income Tax Act, 1961.*

3. *That the Hon'ble CIT (A)-5 has erred in confirming the addition of Rs. 420392/- on account of G.P. on so called Bogus Purchases for Rs. 7006529/- and further enhancing the addition to Rs. 7006529/-, which is against the law and facts.*

4. *That the Hon'ble CIT (A)-5 has erred in dismissing the plea of the assessee for quashing*

the reopening of assessment under section 147 of the Income Tax Act, 1961.

5. *That the Appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off.*

ITA No. 400/Chd/2019 (A.Y. 2011-12):-

1. *That the Hon'ble CIT (A)-5 has erred in rejecting the additional ground of appeal that the re-assessment is liable to be quashed on the ground that the statutory notice u/s 143(2) was not served on the assessee.*

2. *That the Hon'ble CIT (A)-5 has erred in rejecting the additional ground of appeal that the addition has been made by the AO without rejecting the books of account u/s 145(3) of the Income Tax Act, 1961.*

3. *That the Hon'ble CIT (A)-5 has erred in confirming the addition of Rs. 55954/- on account of G.P. on so called Bogus Purchases for Rs. 932568/- and further enhancing the addition to Rs. 932568/-, which is against the law and facts.*

4. *That the Hon'ble CIT (A)-5 has erred in dismissing the plea of the assessee for quashing the reopening of assessment under section 147 of the Income Tax Act, 1961.*

5. *That the appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off.*

19. Both the Ld. representatives of the parties have stated the since the identical grounds have been taken in all the appeals and even the

facts and issues involved are identical, hence, the findings given by us on each of the issue in assessee's appeal for assessment year 2012-13 will apply mutatis-mutandis in these cases also.

In view of the findings given above, the re-assessment framed in all the captioned appeals stand quashed and all the appeals of the assessee stand allowed.

Order pronounced in the Open Court on 28.02.2020.

Sd/-	Sd/-
(अन्नपूर्णा गुप्ता / ANNAPURNA GUPTA)	**(संजय गर्ग / SANJAY GARG)**
लेखा सदस्य/ Accountant Member	**न्यायिक सदस्य/ Judicial Member**

Dated : 28.2.2020

"आर.के."

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant Registrar