

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI

BEFORE SHRI AMIT SHUKLA, JM AND SHRI GAGAN GOYAL, AM

ITA Nos. 4145 & 4177/Mum/2023
(Assessment Years: 2011-12 & 2012-13)

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| Heena Gems 2405, Panchratna, MP Marg Opera House, Charni Road, Mumbai-400 004 | Vs. | ACIT-16(3) Aayakar Bhavan, M. K. Road, Mumbai-400 020 |
| PAN/GIR No. AAAPH 4046 H | | |
| (Assessee) | : | (Respondent) |

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| Assessee by | : | Ms. Ridhisha Jain |
| Respondent by | : | Shri P. D. Chougule |

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| Date of Hearing | : | 11.07.2024 |
| Date of Pronouncement | : | 22.07.2024 |

ORDER

Per Amit Shukla, J M:

The aforesaid appeals have been filed by the assessee against the order dated 19.09.2023, passed by National Faceless Appeal Centre ('NFAC' for short), Delhi for a quantum of assessment passed u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Years ('A.Y.' for short) 2011-12 and 2012-13.

ITA No. 4145/Mum/2023 (Assessment Year: 2011-12)

2. The assessee has challenged the addition of Rs.1,32,14,143/- on account of disallowance of claim of loss made on account of embezzlement of business stock, i.e., gold and diamond stock. The

brief facts are that the assessee is a partnership firm engaged in the business of manufacturing, purchase and sale of gold and diamond jewellery. During the year under consideration, the assessee has claimed loss in the profit and loss account in respect of embezzlement of stock by an employee and others amounting to Rs.1,32,14,143/- and had filed the return of income on 30.09.2011, declaring total loss of Rs.34,53,774/-.

3. The Id. Assessing Officer ('A.O.' for short) required the assessee to explain the loss claimed on account of embezzlement of stock. In response, the assessee had filed reply along with FIR filed by the assessee against the employee who was involved in the embezzlement. One FIR was with regard to theft of Rs.9,50,000/- which was made on 29.09.2010 and thereafter the figure of theft was enhanced to Rs.1,32,18,143/- after the assessee had tallied the entire stock. It was also informed that the stolen goods have not been recovered till the date of lodging of report and, hence, assessee had no option but to reduced it from the stock and debit to P& L Account. It was further informed that the Police thereafter had made enquiry and it has been informed that there are some recovery which has been made by the Police but still the assessee was not able to quantify and value the same as the recovered goods still could not get into the possession of the assessee. The assessee has also filed interim report of the Police

Department and has asked the assessee to approach the Hon'ble Metropolitan Magistrate Court for the inspection of the goods recovered from the culprits. The ld. A.O. has also written letter to the Police Inspector on 07.03.2014. In response, the Police has given reply that the assessee had filed an FIR before the Police Station and the crime has been recorded as per CR No.192/2010 and the charge sheet has been presented against the accused before the Hon'ble Metropolitan Magistrate, Mumbai. They have also given the details of some of the stolen jewellery recovered. However the reply came late post passing of the order. The ld. A.O. after incorporating all the details and replies held that the assessee is in the business of trading and manufacturing of jewellery since last 25 years and the assessee why was inactive to recover the materials even after 4-1/2 years of embezzlement. This explanation is not acceptable as in the normal business this not done as there was a casualness of the assessee in lodging FIR as assessee has filed two FIR for different quantum. Thus, without taking into FIR and explanation he disallowed the claim of embezzlement of Rs.1,32,14,143/-.

4. Before the ld. CIT (A), the assessee filed additional evidence which was the reply/ report filed by the Police Department before the M.M. Court. However, the ld. CIT (A) held that the investigation report of the Sr. Police Inspector is not admissible as additional evidence.

Further, he observed that the Police Officials have merely send recovery of the property report which was recovery of cash and few sets of jewellery. Finally, the claim of theft to the tune of Rs.1,32,14,143/- has not been established. Accordingly, he confirm the order of the ld. A.O. in a very flimsy manner and without considering any of the evidence placed on record.

5. We have perused the relevant findings as well as materials referred to before us. From the perusal of the documents submitted before the authorities below as well as before us, it is seen that the assessee had filed an FIR on 29.09.2010, wherein the assessee intimated the theft of jewellery worth of Rs.9,50,000/-. Thereafter, the assessee had revised the figure after tallying the entire stock and found that the theft was to the extent of Rs.1,32,18,141/- and accordingly the FIR was filed with enhanced figure. These figures are matching with the FIR filed before the Police along with the details of the theft made by the employee, Shri Sanjay N. Kadam and others alongwith the exact description of the jewellery which included cut and polished diamond, gold bar, golden chain and molding. All these details are also mention before the M.M. Court in criminal complaint case filed supra. The ld. A.O. has even written a letter to the Police Inspector on 17.03.2014 to ask what happened further in the FIR report. In response, the Police department had filed a letter/reply

dated 18.03.2014, providing the copy of the FIR's and the entire information as well as the charge sheet report. The reply/report of the Police Inspector which reached before the A.O. belatedly has been placed in the paper book from pg. nos. 68 to 75. Now, once the FIR has been filed by the assessee quantifying the details of embezzlement of the theft; and Police has confirmed the said FIR; and also intimated that, after the enquiry charges have been framed against the concerned persons and charge sheet has been filed and the matter is pending before the Metropolitan Magistrate; along with the part of the recovery of the amount and jewellery, then we do not find any reason to disbelieve the embezzlement. We are unable to appreciate the reasons and logic given by the ld. A.O. and the ld. CIT (A), either for not admitting the reply/report filed by the Police Authorities or disbelieving the entire embezzlement itself once the assessee has adduced the evidence in the form of FIR as well as the case filed before the Metropolitan Magistrate by the Police after the charge sheet. The assessee had duly quantified and tallied the stock to work out the exact details of the gold/diamond jewellery missing from the stock. The assessee had specifically described the quantity which was missing after tallying each and every details of the stock recorded in stock register and also explained the reason for filing of two FIRs. We failed to understand what else according to the AO and CIT (A)

assessee should have filed. Whether the FIR, enquiry by the police and case filed before the M.M. Court is a cover up story by the assessee to make a false claim.

6. Before the Id. CIT (A), the assessee has filed its rebuttal on Id. A.O.'s contention, which for the sake of read reference is reproduced hereunder:

| <i>Ld AO's Contention</i> | <i>Our Submission</i> |
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| <i>The Ld AO's contention that assessee maintains stock register on daily basis as stated in the Audit report and certified by the Auditor then how it took 15 days to determine the value of Embezzlement. Therefore the Ld AO doubted the genuineness of the claim by holding that it is not justified when the stock register and a/c's are maintained on daily basis.</i> | <p><i>It is true that stock is maintained on daily basis but to ascertain which item is stolen it was taking lot of time. Moreover seeing the size of stock which is between 15 Crs to 20 Crs comprising of en number of items weight wise, design wise, gold carat wise, diamond carat size, size of the diamond wise, etc it was not possible to ascertain the theft in 2-3 days. Hence it took 15 days of time which according to the size of stock is most reasonable. It is pertinent to bring to your honour's notice that the Ld AO has not doubted the Embezzlement of gold and diamond studded jewellery having taken place but only doubted the period taken for lodging compliant (FIR) with Police Department.</i></p> <p><i>As regards maintenance of item wise stock register is concerned it is duly maintained and valued. However it is very hard to match each and every item manufactured size wise, weight wise, amount wise, design wise and set wise carat of gold and carat of diamond of several items like earring, pendant, ring, necklace, ct</i></p> |

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| | <p><i>wise gold used in particular jewellery white gold items, chain, bracelet, locket, mangalsutra, etc. Since the stock is varying from size and design it was taking lot of time. In the process it took around 10 days in filing second FIR. The doubt of the Ld AO is nothing but her assumption that why it took 15 days to lodge complaint which cannot be the reason for treating genuine loss as non genuine. The doubt of the Ld AO is without any cogent reason.</i></p> |
| <p><i>The Ld AO's contention that assessee did not produce corresponding purchase invoice giving the value of item embezzled.</i></p> | <p><i>Here it is pertinent to bring to your honour's notice that appellant firm is manufacturing these items by purchasing Gold and Diamond separately. After melting the gold and fixing the diamond of various size and carats it gets the final product size wise and design wise. Hence the question of producing corresponding purchase bill and its value in the case of appellant does not arise. Here it is further pertinent to bring to your honour's notice that the itemwise quantity and value is arrived at only after weighing the item with respect to gold used, diamond Carat used plus labour & other charges, etc. The Ld AO without specifically verifying the facts of the case in causal manner stated that assessee has not produced the purchase invoice when the same was not applicable in the case of appellant.</i></p> |
| <p><i>The Ld AO's contention that in response to letter sent to Police dated 07/03/2014, no reply is received regarding interim report and further assessee has put no efforts to recover jewellery even after 4 years.</i></p> | <p><i>The Ld AO's doubt that appellant's partner has put forth no effort to recover the jewellery from Police - Department indicates that the loss is not genuine is not true but mere her presumption. In this regard appellant firm vide its letter dated 23/12/2013</i></p> |

had apprised of efforts put forth by them. The said reply is self explanatory discussed above in para 2.1.

As regards non receipt of reply from the Police Department it was submitted that it was not in appellant's hands. However we were provided with the copy of report dated 18/03/2014 by the Police Department on 24/03/2014 i.e after completion of assessment. By the time we approached with report we were told by the Ld AO that assessment has already been completed on 23/03/2014. Hence it was told that the same is of no use at present. However we understand that the Ld AO also must have received the same in response to her letter to the Police Department. The copy of the said report received by us is enclosed hereto as per Ex-A. Since the evidence submitted now goes to the root of the matter and is essential in adjudicating the matter in appeal we are herewith submitting the same as an additional evidence under Rule 46A of the Act. We therefore request your honour to admit the said evidence by exercising your power vested under Rule 46A of the IT Act 1961 and oblige. For admission reliance is placed on the following decision:

Jute Corporation of India Ltd. (187 ITR 688)

National Thermal Power Corp Ltd (229 ITR 383) and the decision of the Hon'ble Bombay High Court in the case of Smt. Prabhavati S. Shah v CIT 231 ITR 1 (Bom).

7. The above rebuttal of each and every reason given by the AO clearly points out that the assessee has not only been able to substantiate its claim, but has also filed all the relevant evidences to prove that there was an actual embezzlement. All these explanation and material on record proves beyond doubt the loss of jewellery/ stock claimed by the assessee and we reject the finding and the reasoning given by the authorities below. Accordingly, we hold that the loss claimed by the assessee during the year on account of embezzlement of stock of Rs.1,32,14,143/- is allowed and disallowance made by the AO is deleted. Accordingly, the appeal of the assessee is allowed.

ITA No. 4177/Mum/2023 (Assessment Year: 2012-13)

8. In the grounds raised by the assessee in A.Y. 2012-13, the issue pertains to the addition on account of bogus purchases of Rs.53,84,050/- by treating the entire purchases made by few parties as 'unexplained'. The brief facts are that the assessee had declared income of Rs.92,69,088/- in the return of income filed on 18.07.2012. Later on, the ld. A.O. received information from the DGIT (Investigation), Mumbai pursuant to the search and survey action on Shri Rajendra Jain group on 03.10.2013, wherein the report based on information on portal of Maharashtra VAT department about few

dealers providing bogus bills, deduced that the assessee has taken accommodation entries from the following entities:

| Sr. no. | Name | Amount |
|---------|-------------------------|-----------|
| 1 | M/s. Aadi Impex | 29,00,800 |
| 2 | M/s. Kalash Enterprises | 24,83,250 |
| | Total | 53,84,050 |

9. Based on this information, the ld. A.O. reopened the case u/s 147 by issuing notice u/s. 148 on 13.03.2019. The ld. A.O. had treated the entire purchase of Rs.53,84,050/- as bogus after detailed discussion and added the entire 100% purchase from these two dealers. Before making an addition the ld. A.O. had discussed the entire background of Shri Rajesh Jain and Group who was involved in providing bogus purchase bills and accommodation entries through various entities. The ld. CIT (A) has confirmed the said addition.

10. Before us, the ld. counsel submitted that all the purchases have been made through banking channels, wherein the entire quantity of purchases and corresponding sales has not been disputed. The assessee had submitted the entire details of the parties, ledger account, confirmation, corresponding sales of the purchase made from such parties, the purchase and sale bills, bank statements, etc. Out of all the purchases, the ld. A.O. has only doubted the purchases made from the above parties and had added the entire amount. Once the assessee had submitted all the details, then, without disputing the

purchase quantities recorded in books and the corresponding sale, the entire addition on account of purchases cannot be made. On the other hand, the learned Departmental Representative relied on the order of the ld. CIT (A).

11. On perusal of the material placed on record before us, it is seen that the assessee had filed the details of the purchase made from M/s. Aadi Impex and M/s. Kalash Enterprises which have been placed at pages 34 to 51 of the paper book, which shows the quantity of the purchases and the payment made through banking channels along with the Affidavit and the confirmation of the parties. Apart from that, the assessee has also filed the corresponding sales/exports of the same quantity and the diamonds purchased from these two parties. Once the assessee has filed a copy of the ledger account, confirmation of the parties and bank statement, highlighting the payments made to the parties, their ITR's and Affidavits, and above all, the corresponding quantity of the sales made, then the entire purchases could not have been added. The source of the purchases are from the books, therefore, the addition could not have been made u/s. 69C of the Act. The Hon'ble Bombay High Court in the case of **PCIT vs. Ashwin Purshotam Bajaj [2023] (ITA No.576 of 2018** vide order dated 12.07.2023) held that section 69 is not applicable to such bogus purchases and only profit has to be added and their Lordships have

also held that, once the sales have not been doubted against the said purchases and there is no dispute regarding the quantitative details of stock as per books then the ld. A.O. cannot add the entire purchase and only GP rate is to be applied. Similar view has also been taken by the Hon'ble Bombay High Court decision in the case of **PCIT vs. Rishabhdev Technocable Ltd. (ITA) No.1330 of 2017** vide order dated 10.02.2020. Moreover, we find that in case of the assessee for A.Y. 2007-08, 2008-09 and 2009-10, this Tribunal vide order dated 13.11.2017 had applied GP rate of 3% over and above the GP rate declared by the assessee. Accordingly, in the facts and circumstances of the case, the gross profit of 3% is applied over and above the GP rate declared by the assessee on the bogus purchase of Rs.53,84,000/-, which works out to Rs. 1,61,520/-. Accordingly, the assessee gets part relief.

12. In the result, the appeal filed by the assessee for A.Y. 2012-13 is partly allowed and the assessee's appeal for A.Y. 2011-12 is allowed.

Order pronounced in the open court on 22nd July, 2024.

Sd/-
(Gagan Goyal)
Accountant Member

Sd/-
(Amit Shukla)
Judicial Member

Mumbai; Dated : 22/07/2024

Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai