

आयकर अपीलीय अधिकरण “E” न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI
BEFORE SHRI A.D. JAIN, JM AND SHRI RAJENDRA, AM**

श्री ए.डी. जैन, न्यायिक सदस्य एवं श्री राजेन्द्र, लेखा सदस्य ।

आयकर अपील सं./I.T.A. No. 7593/Mum/2011

(निर्धारण वर्ष / Assessment Years : 2006-07

The Asstt. Commissioner of Income Tax -8(3), Room No. 217, Aayakar Bhavan, M.K. Marg, Mumbai - 400 020.	बनाम/ Vs.	Tristar Jewellery Exports Private Limited, Plot No. 1 & 2 (Part), Ground Floor, SEEPZ-SEZ, Andheri (East) Mumbai 400 096.
स्थायी लेखा सं./PAN : AABCT0755H		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No. 6435/Mum/2013

(निर्धारण वर्ष / Assessment Years : 2006-07

The Dy. Commissioner of Income Tax -8(3), Room No. 217, Aayakar Bhavan, M.K. Marg, Mumbai - 400 020.	बनाम/ Vs.	Tristar Jewellery Exports Private Limited, Plot No. 1 & 2 (Part), Ground Floor, SEEPZ-SEZ, Andheri (East) Mumbai 400 096.
स्थायी लेखा सं./PAN : AABCT0755H		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No. 8292/Mum/2011
(निर्धारण वर्ष / Assessment Years : 2006-07

Tristar Jewellery Exports Private Limited, Plot No. 1 & 2 (Part), Ground Floor, SEEPZ-SEZ, Andheri (East) Mumbai 400 096.	बनाम/ Vs.	The Dy. Commissioner of Income Tax -8(3), Room No. 217, Aayakar Bhavan, M.K. Marg, Mumbai - 400 020.
स्थायी लेखा सं./PAN : AABCT0755H		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Department by	Shri Chandra Vijay
Assessee by :	Shri Prakash K. Jotwani

सुनवाई की तारीख / **Date of Hearing** : 23-07-2015
घोषणा की तारीख / **Date of Pronouncement** : 31-7-2015

I
आदेश / ORDER

PER A.D. JAIN, J.M.

:

ए.डी. जैन, न्यायिक सदस्य

ITA No. 7593/Mum/2011, for A.Y. 2006-07 has been filed by the Department whereas ITA No. 8292/Mum/2011, for A.Y. 2006-07 stands filed by the assessee, against the action of the ld. CIT(A) in restricting the disallowance of 25% of purchases made by the A.O. to 7%. The Department's contention is that the disallowance had to be confirmed in toto, whereas according to the assessee, the disallowance requires to be deleted in full.

2. As per the Registry, there is a delay of 10 days in the filing of the assessee's appeal. As per the affidavit filed by the Director of the Company, he was travelling from 11-11-2011 to 7-12-2011 and was not available in India for filing the appeal and it was, therefore, that the appeal, which ought to have been filed on 27-11-2011, got to be filed on 8-12-2011, incurring a

delay of 10 days. In view of the contents of the affidavit, finding it to be a case of sufficient cause preventing the filing of the appeal in time, the delay is condoned.

3. ITA No. 6435/Mum/2013, for A.Y. 2006-07 is Department's appeal against the ld. CIT(A)'s action of deletion of concealment penalty of Rs. 11,94,545/- imposed on the assessee in the aforesaid matter.

4. As per the record, the completed assessment of the assessee for the year under consideration, i.e. A.Y. 2006-07 was reopened on the basis that information was received from the ITO -25(20(1), Mumbai, that during the survey proceedings conducted at the premises of M/s Zalak Impex, a proprietary concern of one Shri Hiten L. Rawal. The said assessee, in his statement recorded u/s 136 of the Act, had confessed to have provided accommodation entries in the form of sales and purchases to various parties, including the assessee, who had allegedly obtained bogus bills for non-existing purchases of Rs. 4,09,12,718/- during the year. The A.O. added 25% of such alleged bogus purchases to the income of the assessee. The ld. CIT(A) reduced the addition to 7%, amounting to Rs. 35 lacs.

5. Before the ld. CIT(A), the assessee raised the following ground of appeal, amongst others:-

“2(e) The Learned Assessing Officer failed to appreciate that appellant has not given the opportunity to cross-examine Shri Hiten Rawal, proprietor of M/s Zalak Impex. The addition therefore cannot be sustained.”

6. The ld. CIT(A), however, did not adjudicate the said ground. Placing reliance on the Tribunal order dated 8-8-2014, passed in ITA No. 6735/Mum/2010 for A.Y. 2006-07, in the case of “ACIT vs. M/s Say India Jewellers Pvt. Ltd”., which is one of the parties, like the assessee, alleged to have made bogus purchases from M/s Zalak Impex. The ld. Counsel for the

assessee has contended that, in the present case, like in the case of M/s “Say India Jewellers Pvt. Ltd.”, the A.O. did not draw any adverse inference so far as regards the export of diamonds by the assessee and that the addition made was only on assumptions and presumptions. It has been submitted that the statement of Shri Hiten L. Rawal, proprietor of Zalac Impex was never provided to the assessee and no opportunity of cross examination of Shri Rawal was afforded to the assessee, thereby leading to the illegal addition, which was wrongly sustained in part by the Id. CIT(A), though it ought to have been deleted in full.

7. The Id. D.R., on the other hand, relying on the impugned order, has contended that as per the assessment order, the A.O. had asked the assessee to produce Shri Hiten L. Rawal, which the assessee did not do; and that therefore, the addition made by the A.O. was perfectly justified and it ought to have been confirmed in its entirety.

8. Having heard the parties and having perused the material on record, we find that the completed assessment of the assessee was reopened on the basis of the statement of Shri Hiten L. Rawal, the proprietor of M/s Zalac Impex. In this statement recorded u/s 131 of the Act, Shri Rawal confessed to have provided accommodation entries in the form of sales and purchases, to various parties. The assessee was stated to have obtained bills for non-existing parties, amounting to Rs. 4,09,12,718/-, during the year under consideration. The assessment order dated 21-12-2010 was passed pursuant to the said reopening.

9. It remains undisputed that the assessee was never provided any opportunity to cross examine Shri Hiten L. Rawal, though he specifically asked for such cross examination. On the other hand, the burden was sought to be shifted on the assessee by the A.O., by asking him to produce Shri Rawal, even though it was the A.O. who had relied on the statement of Shri

Rawal, without either confronting this statement to the assessee, or providing opportunity to the assessee to cross examine Shri Rawal. Therefore, the reassessment order is as a result of violation of the natural principle of *audi alteram partem*. A statement recorded at the back of a party cannot be used against such party without confronting such statement to the party. Hence, on this score alone, the reassessment order is unsustainable in the eye of law and we hereby cancel the same. As a consequence, the order of the Id. CIT(A) is also cancelled in toto.

10. Further, even otherwise, before the A.O., the assessee had contended, by written submissions filed on 25-11-2010, inter alia, that during the year, they had purchased diamonds worth Rs. 4,09,12,718/- from M/s Zalak Impex; that the assessee being in an export promotion zone, the movement of its goods is controlled and customs approved; that the purchases being approved purchases, there was no question of their being bogus purchases. The assessee enclosed the custom approved invoices in respect of purchases from Zalak Impex. These invoices have been produced before us also, in the paper book filed by the assessee. As per these invoices, the goods purchased had been verified and approved by the Customs Authority. This clearly shows that the goods had actually been purchased and received by the assessee. As such, these purchases could not have, by any stretch of imagination, been treated as bogus purchases. It is also noteworthy that the payments made by the assessee to Zalak Impex were through account payee cheques only. Neither of the Taxing Authorities, however, took these invoices into consideration and wrongly held the assessee's purchases from Zalak Impex to be bogus purchases. Nothing has been brought on record to show that these invoices were self made or fabricated. Moreover, the comparative chart of purchases made during the year and the selling price (page 141-144), as filed before the Id. CIT(A) has not been refuted and this also goes to prove the theory of bogus bills and accommodation entries to be wrong. Therefore, the

order under appeal is a result of complete misreading and non-reading of cogent documentary evidence brought on record by the assessee. For this reason also, along with the reason that the sales made by the assessee were never questioned, the addition is deleted in toto.

11. ITA No. 6435/Mum/2013 has been filed by the Department against the action of the ld. CIT(A) in deleting the penalty of Rs. 11,94,545/-.

12. The A.O. levied the penalty in question qua the aforesaid addition made. The ld. CIT(A) deleted the penalty, holding that the penalty was not leviable on addition made on estimation basis and that it did not stand confirmed that the assessee had willfully submitted in-accurate particulars to conceal its income.

13. We have, in the preceding portion of this order, cancelled the addition made, in toto. Therefore, the very basis of the levy of penalty in question no longer survives. Accordingly, the grievance of the Department is rejected and the order of the ld. CIT(A) deleting the penalty is upheld.

14. In the result, ITA Nos. 7593/Mum/2011 and 6435/Mum/2013 filed by the Department are dismissed, whereas ITA No. 8292/Mum/2011 filed by the assessee is allowed.

Order pronounced in the open court on 23rd July, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांक: 23-07-2015. को की गई ।

Sd/-
(RAJENDRA)

लेखा सदस्य ACCOUNTANT MEMBER

sd/-
(A.D. JAIN)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 31-07-2015

व.नि.स./ R.K., Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- 38, Mumbai
4. आयकर आयुक्त / CIT- Cent. IV Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai E Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai