IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL (IT) NO.937 OF 2017
WITH
INCOME TAX APPEAL (IT) NO.1121 OF 2017
AND
INCOME TAX APPEAL (IT) NO.1135 OF 2017

Pr.Commissioner of Income Tax, Central-4. … Appellant
V/s.
M/s Sunshine Import and Export Pvt. Ltd. … Respondent

Mr.Sham Walve with Mr.Pritish Chatterji, Advocate for the Appellant.
Ms.Aasifa Khan, Advocate for the Respondent.

CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.
DATE : MARCH 4, 2020

P.C.:-

1. This order will dispose of Income Tax Appeal Nos.937, 1121 and 1135 of 2017.

2. We have heard Mr.Sham Walve, learned standing counsel, Revenue for the appellant; and Ms.Aasifa Khan, learned counsel for the respondent-assessee.

3. This appeal under Section 260A of the Income Tax Act, 1961 (briefly "the Act" hereinafter) has been preferred by the Revenue assailing the order dated 9th September, 2016

passed by the Income Tax Appellate Tribunal, “B” Bench, Mumbai ("the Tribunal” for short) in Income Tax Appeal No.4347/Mum/2015 for the assessment year 2008-09.

4. Be it stated that Income Tax Appeal No.937 of 2017 pertains to assessment year 2009-10, whereas Income Tax Appeal Nos.1121 and 1135 of 2017 pertains to assessment year 2008-09. All the appeals were disposed of by the Tribunal vide the common order dated 9th September, 2016.

5. On the request of Mr. Walve, Income Tax Appeal No. 937 of 2017 is taken up as the lead appeal.

6. This appeal has been preferred by the Revenue projecting the following questions as substantial questions of law:-

> “(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in holding that on the basis of the statement of the director Shri Saurabh N. Garg alone, the AO cannot come to the conclusion that the assessee has issued accommodation bills and reject the books of account of the assessee?
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> (ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal had failed to appreciate that the evidentiary value of the statement given by a director of the assessee company could not be disputed and the assessment order was passed by the Assessing Officer on the basis of various circumstantial evidence which has been brought out in the assessment order and the Tribunal ought to have considered such circumstantial evidence while making its decision?

(iii) Whether on the facts and in the circumstances of the case and in law, the order of the Tribunal is perverse in the sense that the conclusion does not follow the facts found and thus, gives rise to a question of law?

(iv) Whether on the facts and in the circumstances of the case and in law, the Tribunal failed to appreciate the evidentiary value of the statement given by a director of the company and circumstantial evidence brought out in the assessment order while holding that the interest income is assessed as business income ignoring the fact that the said business is only of giving accommodation entries?"

7. Respondent is an assessee under the Act engaged in the business of manufacturing and trading in precious and semi-precious stones and jewellery in the name and style of M/s Sunshine Import and Export Private Limited. Assessee is a company having two Directors-Shri Paras Jain and Shri Saurabh Garg.

8. A survey under Section 133A of the Act was carried out in respect of the respondent/assessee. During the post survey proceedings, statement of one of the Directors i.e. Shri Saurabh Garg was recorded. In one of his statements he was reported to have stated that respondent provided only bill entries and there was no actual transaction of purchase and sale. Subsequently, statement of the other Director-Shri Paras Jain was also recorded. From the statement of Shri Paras Jain Assessing Officer came to the conclusion that he was a person of no means and drew the inference that respondent/assessee was engaged in the activity of issuing accommodation bills for purchase and sale of diamonds

coupled with acting as a dummy for importer. Holding the transactions as not reliable, Assessing Officer rejected the books of account of the respondent. By the assessment order dated 6th March, 2013 the Assessing Officer assessed 2% as the rate of commission of the respondent/assessee on account of import purchases i.e. for acting as a dummy. That apart, commission @ 0.75% on sales bills was assessed.

9. Aggrieved by the aforesaid order passed by the Assessing Officer, respondent preferred appeal before the Commissioner of Income Tax (Appeals)-49, Mumbai, also referred to first appellate authority hereinafter. By the appellate order dated 29th May, 2015, the first appellate authority confirmed the action of the Assessing Officer.

10. Continuing to be aggrieved, respondent preferred further appeal before the Tribunal. Similar appeals were preferred for the other assessment years. By the common order dated 9th September, 2016, the Tribunal returned the finding that assessee was not engaged in issuing the accommodation bills and acting as a dummy for importing diamond bills. Therefore, Assessing Officer was directed to delete the income as estimated by him and to accept the book results declared by the assessee.

11. Aggrieved, Revenue is in an appeal before us raising the above questions for consideration.

12. Submissions made by learned counsel for the parties have been considered.

13. At the outset, we may reproduce relevant portion of the order passed by the Tribunal which is as under:-

> "13. Further from the record we found that the assessee is mainly engaged in the imports of diamonds and sales in local markets to exporters who export the goods. The import of diamonds is done through customs authorities and banking channel in India. The import of diamonds undergoes appraisal process by the appraisers appointed by the custom authorities. The officers appointed by Government of India verify physically each and every parcel of diamonds in order to ascertain the quality, quantity, rate, value and place of origin vis a vis declared by the importers. Further all the transaction of purchase, sales import is made through cross account payee cheques and not a single payment made to any party by way of cash. All the purchase and sales transactions are carried out with reputed parties of the diamond trade and all the payment received from debtors are through cross account payee cheques and all payment made to creditors are through cross account payee cheques. The Ld. AO cannot allegedly consider the imports of goods as providing accommodation bill in the market when physical delivery of goods were confirmed by the other arm of government authorities I.e custom authorities. From the record we found that the sales were made to reputed exporters who are assessed to tax and their identities are known to income tax department. The customers are registered under state VAT laws. The company has received payments against sales proceeds by account payee cheques. The company has also purchased from local parties to whom payment were made by account payee cheques.

From the record we also found that to discharge the onus of proving transaction as genuine and to substantiate that all purchases and sales made are genuine the assessee have submitted following documents and submissions on time to time which was ignored by A.O. while making the reassessment:

a. Copies of bank statement for the relevant year.
b. Ledger copies of various purchases parties for A.Y. 2008-09 and 2009-10.
c. The Xerox copies of purchases invoices of parties for A.Y. 2008-09 and 2009-10.
d. The relevant copies of the daily stock Register.
e. Confirmation from various sale parties.
f. Details of interest received from various parties.
g. Details of unsecured loan alongwith confirmation.

These documents prove that the assessee is not engaged in issuing accommodation bills and acting as a dummy for importing diamonds bills. Thus, the contention of the ld. AO that the bills issued by the assessee are all accommodation bill is wrong. Just on the basis of the statement recorded he cannot come to the conclusion that the assessee has issued accommodation bills and reject the books of account of the assessee."

14. From the above, it is evident that on verification of documents and other materials on record Tribunal was satisfied that the respondent was mainly engaged in the import of diamonds and sales in local markets to exporters who export the goods. Import of diamonds by the respondent

was done through custom authorities and through regular banking channels in India. The procedure governing trading in diamonds was discussed. It was also noted that all the transactions relating to purchase and sales were made through account payee cheques and that there was not a single transaction by way of cash. Parties to the transaction were reputed in the trade; sales were made to reputed exporters who were assessed to tax and their identities were known to the Income Tax Department besides they were registered under the state tax laws. Thus, Tribunal noted that assessee had discharged the onus of proving the transactions as genuine by furnishing relevant documents, such as, copies of bank statements, ledger copies of various purchases, xerox copies of purchase invoices, relevant copies of daily stock register, confirmation letters etc. On such basis Tribunal recorded a clear finding of fact that assessee was not engaged in issuing accommodation bills and acting as a dummy for importing diamond bills. In arriving at such finding Tribunal noted that the survey party did not find any incriminating evidence and material that could establish the stand taken by the Assessing Officer. There was no dispute to the fact that no incriminating evidence was found on the day of the survey. It was also noted that merely on the basis of statement of one of the directors i.e. Shri Saurabh Garg that too recorded after 20-25 days of the survey could not be a basis for bringing into assessment and making any addition to the income without further supporting or corroborative evidence. Statement recorded under Section 133A of the Act not being recorded on oath cannot have any evidentiary value and no addition can be made on the basis of such statement.

15. In **300 ITR 157 (CIT Vs. S. Khader Khan Son),** the Madras High Court surveyed the law relating to statement recorded under Section 133A of the Act and culled out the following legal principles :-

> “7. From the foregoing discussion, the following principles can be culled out:-
> (i) An admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts, vide decision of the Apex Court in Pullangode Rubber Produce Co. Ltd. v. State of Kerala [(1973) 91 I.T.R. 18];
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> (ii) In contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews and Sons v. Commissioner of Income-tax [(2003) 263 I.T.R. 101];
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> (iii) The expression "such other materials or information as are available with the Assessing Officer" contained in Section 158BB of the Income-tax Act, 1961, would include the materials gathered during the survey

> operation under Section 133A, vide Commissioner of Income-tax v. G.K. Senniappan [(2006) 284 I.T.R. 220];
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> (iv) The material or infomration found in the course of survey proceeding could not be a basis for making any addition in the block assessment, vide decision of this Court in T.C. (A) No.2620 of 2006 (between Commissioner of Income-tax v. S.Ajit Kumar);
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> (v) Finally, the word "may" used in Section 133A (3)(iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act, as already extracted above, makes it clear that the materials collected and the statement recorded during the survey under Section 133A are not conclusive piece of evidence by itself."

16. Thus, Madras High Court concluded that statement recorded under Section 133A of the Act is not given any evidentiary value and that materials or information found in the course of survey proceedings could not be a basis for making any addition; besides materials collected and statement obtained under Section 133A would not automatically bind upon the assessee.

17. The above decision of the Madras High Court has been affirmed by the Supreme Court by dismissing the civil appeal of the Revenue in **352 ITR 480,CIT Vs.S. Khader Khan Son.**

18. In view of the discussions made above, we see no reason to interfere with the order passed by the Tribunal. Consequently, the appeal fails and is accordingly dismissed. No cost.

19. In view of the above order, Income Tax Appeal Nos.1121 and 1135 of 2017 are also dismissed.

(MILIND N. JADHAV, J.) **(UJJAL BHUYAN, J.)**

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