

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ 'SMC', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "SMC", MUMBAI
Before Shri Shamim Yahya, Accountant Member

ITA No.1269/Mum/2017 : Asst.Year 2009-2010

Shri Nayan J.Balu 72, 1 st Floor, Bhavnagari Building Nanubhai Desai Road Near 1 st Khetwadi Lane Mumbai – 400 004. PAN : ADUPB2495B.	बनाम/ Vs.	The Income Tax Officer Ward 19(2)(4) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by : Shri R.N.Mehta
प्रत्यर्थी की ओर से /Respondent by : Shri B.Satyanarayana Raju (Sr.DR)

सुनवाई की तारीख / Date of Hearing : 16.05.2017	घोषणा की तारीख / Date of Pronouncement : 03.07.2017
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आदेश / ORDER

This appeal by the assessee is directed against the order of CIT(A) dated 19.12.2016 and pertains to assessment year 2009-2010.

2. The issue raised by the assessee are as under:-

(a) Order passed u/s 143(3) r.w.s. 147 of the Act be treated as invalid and bad in law.

(b) Addition of Rs.34,25,377 by estimating profit @ 12.50% on alleged purchases be deleted.

3. Brief facts of the case are as under:-

3.1 In this case information received from the DGIT(Inv.), Mumbai, that there was a scam unearthed by Sales Tax Department regarding issue of

hawala bills and accommodation entries by several parties in Mumbai, availed by several assessee to inflate their purchases or expenses and thereby reducing their tax liabilities. As per the information, the appellant also indulged in bogus purchases from M/s. Navratan Impex, to the tune of Rs. 2,74,03,016, and the assessment was reopened by issuing notice u/s 148 of the Act on 28-03-2014. Assessment u/s 143(3) r.w.s 147 of the Act was passed on 04-03-2015, assessing the total income at Rs. 42,25,030.

3.2 During the course of reopened assessment proceedings, to ascertain the genuineness of purchases shown in the accounts, notices u/s 133(6) was sent to the concerned party. Notice was returned undelivered by the postal authorities with the remarks 'not known', 'no such address', 'left' etc. The assessee was asked to produce the said party from whom such purchases were claimed to have been made, for examination. The assessee failed to do so and also could not file the vital documents such as delivery challans, transport receipts, Octroi receipts, receipt of weighbridge for weighing of goods, excise gate pass, goods inward register maintained at godown etc. Assessee could not establish genuineness of purchases made. The AO rejected the books of accounts u/s 145(3) of the Act, since the purchases to that extent remained unverifiable. AO, concluded that the purchases made was non genuine transaction to suppress the profits and to reduce the tax liability and estimated the profit element embedded @12.5% on such purchase of Rs. 2,74,03,016, which worked out to Rs. 34,25,377 and added to the total income of the assessee.

4. The assessee's objection to the reopening was rejected by the learned CIT(A). The learned CIT(A) held as under:-

“5.7 As already mentioned, for the purpose of invoking section 147 before the expiry of four years from the end of the relevant assessment year, the clauses in the proviso that income chargeable to tax should have escaped assessment by reason of failure on the part of the assessee either (i) to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148, or (ii) to disclose fully and truly all material facts necessary for his assessment will not come into picture. From the reasons recorded it is apparent that the assessment is sought to be reopened on the ground that, through accommodation entries in the purchase transactions which are not there in reality. In view of the same it is clear that there was a reason to believe that income chargeable to tax has escaped assessment for the assessment year under consideration and the same issue was not examined in the original assessment proceedings and the information about the bogus entries was not available before the Assessing Officer at the time of original assessment. As on the date of recording reasons, new material ad come on record, new information had been received by the AO to trigger reopening of assessment. In these circumstances, the condition precedent for a valid exercise of the power to reopen the assessment, is very much present in this case. The conditions which are prescribed by the statute, for the exercise of reopening are fulfilled in the present case.

5.8 In the present case, as already mentioned, the material facts relating to the bogus purchase transaction information received from the DGIT(Inv.) about the accommodation entries was not available at the time of original assessment, and only small additions were made. There is 'tangible' new material has been received by the Assessing Officer and was available to the AO at the time of recording reasons. In view of the same it is not a case where the AO, without application of mind issued notice u/s 148 after recording reasons for escapement of income as contended by the appellant. There are evidences on record which suggests that the material filed by the appellant along with the return and available on record indicate suppression of

material facts or primary facts necessary for reopening the assessment. It is a case where the primary facts disclosed by the appellant were incorrect or that there were other facts which were material for the assessment which had not been disclosed by the appellant. In the circumstances, the deeming provision in Explanation 2 to section 147 had clearly applicable to the facts of the instant case.

5.9 Thus, there is clear failure on the part of the appellant to disclose fully and truly all material facts necessary for its original assessment for the assessment year under consideration, the notice under section 148 of the Act having been issued that too within a period of four years from the end of the relevant assessment year, the very initiation of proceedings under section 147 of the Act based on the reasons recorded stands supported and can be sustained. Hence, in my considered view, the present reopening of assessment was not based on a mere change of opinion on the same set of facts available the time of original assessment proceedings.

5.10 For the foregoing reasons, I am of the considered opinion that the Assessing Officer is legally justified in reopening of the assessment u/s. 147 of the I.T. Act, on the basis of the reasons recorded within four years from the end of the relevant assessment year. Accordingly, the initiation of proceedings by issue of impugned notice under section 148 of the Act, in the present case for the assessment year under appeal is very much legally valid and therefore the consequential assessment made is a valid assessment. The assessee fails on the issues raised with regard to the reopening of the assessment in Ground No.1.”

5. As regards the merits of the case, the learned CIT(A) affirmed the Assessing Officer's action.

6. Against the above order, assessee is in appeal before ITAT.

7. I have heard both the Counsel and perused the records.

7.1 On careful consideration I note that in this case information was received by the Assessing Officer from DGIT Investigation (Mumbai) there are some parties who are engaged in the hawala transactions and are also involved in issuing bogus purchase bills for sale of material without delivery of goods, which information was based on information received by Revenue from Maharashtra Sales Tax Authority. Information was received that the assessee was beneficiary of hawala accommodation entries from entry provider M/s.Navratan Enterprises by way of bogus purchase. The accommodation entry provider has deposed and admitted before the Maharashtra Sales Tax Authority vide statement/ affidavit that they were engaged in providing bogus accommodation entries wherein bogus sale bills were issued without delivery of goods, in consideration for commission. These, accommodation entry providers, on receipt of cheques from parties against bogus bills for sale of material, later on withdrew cash from their bank accounts which was returned to beneficiaries of bogus bills after deduction of their agreed commission. The Assessee was stated to be one of the beneficiaries of these bogus entries of sale of material from hawala entry operators in favour of the assessee wherein the assessee made alleged bogus purchases through these bogus bills issued by hawala entry providers in favour of the assessee. These dealers were surveyed by the Sales Tax Investigation Department whereby the directors of these dealers have admitted in a deposition vide statements/affidavit made before the Sales Tax Department that they were involved in. issuing bogus purchase bills without

delivery of any material. The assessee is stated to be beneficiary of bogus purchase bills to the tune of Rs. 2,74,03,016.

7.2 From the above, I find that tangible and cogent incriminating material were received by the AO which clearly showed that the assessee was beneficiary of bogus purchase entries to the tune of Rs. 2,74,03,016 from bogus entry provider which formed the reason to believe by the AO that income has escaped assessment. The information so received by the AO has live link with reason to believe that income has escaped assessment. On these incriminating tangible material information, assessment was reopened. At this stage there has to be prima facie belief based on some tangible and material information about escapement of income and the same is not required to be proved to the guilt. In this regard, I refer to the decision of the Hon'ble Apex Court in the case of CIT(A) Vs. Rajesh Jhaveri Stock Brokers P. Ltd, 291 ITR 500:-

"Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the AO has cause or justification to know or suppose (hat income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the AO should have finally ascertained the fact by legal statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Managnese Ore Co, ltd. v. ITO(1991) 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which

a reasonable person could have formed a requisite belief Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the AO is within the realm of subjective satisfaction ITO v. Selected Dalurband Coal Co, (P.) Ltd. (1996) 217 ITR 597 (Supreme Court): Raymond Woollen Mills Ltd. v. ITO (1999) 236 ITR 34 (Supreme Court).”

7.3 The above discussion and precedent from Apex Court fully justify the validity of reopening in this case. Further I find that the Ld. CIT(A) has carefully examined the issue and has properly appreciated the issue. Hence, I do not find any infirmity in the same. Accordingly, I uphold the order of the Ld. CIT(A) on the issue of reopening. Since, the issue has been decided on the basis of the Hon'ble Apex Court decision, the other case laws referred by assessee are not supporting the assessee's case.

7.4 As regards the merits of the case, I find that the assessee in this case has not been able to prove that the impugned purchases are genuine. Overwhelming evidence have been brought on record including the crucial one regarding lack of evidence of transportation of goods which shows that the impugned purchases are bogus. Ld. Departmental representative has submitted that in a similar case of bogus purchase Gujarat High Court No.240 of 2003 in the case of N.K. Industry Vs. DCIT in order dated 20.06.2016 wherein 100% of the bogus purchases has been held to be added in the hands of the assessee and Tribunal's restriction of addition to 25% of the bogus purchases was set aside. The special leave petition against this order has been dismissed by the Hon'ble Apex Court by order dated 16/01/2017.

7.5 However, I find that it may not be appropriate in this case to take away the relief that has been granted by the Assessing Officer. Hence, in these circumstances, I find that it is clear that the assessee has made the purchases from grey market and purchases from grey market give benefit to the assessee in the form of non- payment of taxes and others. Hence, disallowance of 12.5% of the bogus purchases is very reasonable. Hence, I do not find any infirmity of the Ld. CIT(A). Accordingly, I uphold the same.

8. In the result, on this appeal filed by the assessee stands dismissed.

Order pronounced on this 03rd day of July, 2017.

Sd/-
(Shamim Yahya)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 03rd July, 2017.
Devdas*

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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