

**IN THE INCOME TAX APPELLATE TRIBUNAL 'K' BENCH, MUMBAI
BEFORE SHRI RAJENDRA, AM AND SHRI RAVISH SOOD, JM**

आयकर अपील सं./ I.T.A. Nos. 1787/Mum/2017

&

C.O No. 204/Mum/2017

(निर्धारण वर्ष / Assessment Year's: 2010-11)

ITO 20(1)(2), Ist Floor, R.No. 119, Piramal Chambers, Lalbuag Parel, Mumbai- 400012	बनाम/ Vs.	Ashik Ali Husain Ali Unwala, Veena Beena Apts, A D Marg, Sewree, Mumbai-400015
स्थायीलेखासं ./ जीआइआरसं ./ PAN/GIR No.		AAJPU6627H
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/ Assessee by	:	Shri. C.V. Dharkan
प्रत्यर्थी की ओर से/ Revenue by	:	Shri. Saurabh K. Rai, D.R.

सुनवाई की तारीख/ Date of Hearing	:	13.10.2017
घोषणा की तारीख / Date of Pronouncement	:	25.10.2017

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the revenue and the cross objection of the assessee arising there from are directed against the order passed by the CIT(A)-32, Mumbai, which in itself arises from the assessment order passed u/s 143(3) r.w.s 147, dated. 19.02.2016.

The revenue assailing the order passed by the CIT(A) had raised before us the following grounds of appeal :

- “1. On the facts and circumstances of the case and in law the ld CIT(A) erred in granting relief of Rs. 82,66,498/- by restricting the addition to 12.5% of the alleged bogus purchases from hawala parties in respect of unpaid purchases.
2. On the facts and circumstances of the case and in law, Ld CIT(A) has failed to appreciate the fact that the assessing officer disallowed 100% of the bogus purchases relying on various case laws.
3. On the facts and circumstances of the case and in law, the ld CIT(A) has failed to appreciate the fact that the onus is on the assessee to explain and substantiate the genuineness and true nature of the purchases transaction.
4. On the facts and circumstances of the case and in law, the ld CIT(A) has failed to appreciate that the hawala dealers have admitted on oath before the Sales Tax authorities that they have not sold any material to anybody.
5. On the facts and circumstances of the case and in law, the ld CIT(A) erred in concluding that assessee had made cash purchases from other parties which were not recorded in the books without mentioning how this and with what evidence before him such findings was arrived at. If such evidence of cash purchases was given the same should have been remanded to the AO for the examination and comments.
6. On the facts and circumstances of the case and in law, the ld CIT(A) has erred in admitting additional evidence in respect of bad debt of Rs. 2,33,986/- and not giving specific opportunity to then Assessing Officer as required under Rule 46A of the Income Tax Act, 1961 as no detail were furnished during the assessment.
7. The appellant prays that the order of the CIT(A) on the above grounds be reversed and that of the Assessing Officer be restored.
8. The appellant craves leave to amend or alter any ground which may be necessary.”

The assessee objecting to the order passed by the CIT(A), had raised before us the following grounds of cross objections :

1. On the facts and in the circumstances of the case and in law the learned CIT(A) ought to have declared the Order passed by ITO as non est and bad in law. The order passed by the learned A O was beyond the scope and ambit of the provisions of 148 and was thus null and void an initio.

2. Briefly stated, the facts of the case are that the assessee who is engaged in the business of trading in navigation goods, fire extinguishers, edible oils etc. to shipping companies had filed its return of income declaring total income of Rs. 9,39,132/- on 29.09.2010. The return of income filed by the assessee was processed as such u/s 143(1) of the 'Act'. That on the basis of information received by the A.O that the assessee had claimed bogus purchases of Rs. 1,14,00,574/-, the case of the assessee was reopened u/s 147.

3. That during the course of the assessment proceedings the A.O called upon the assessee to substantiate the genuineness and veracity of the purchases aggregating to Rs. 1,14,00,574/- made by the assessee from the following parties :

Tin No.	Name	F.Y.	Amt. In Rs.
27200610259V	Surachi Multitrade Private Limited	2009-10	7,67,954/-
27100503032V	Deepali Enterprises	2009-10	76,068/-
27900588728V	Balaji Trading	2009-10	4,55,625/-
27210561220V	National Trading Co	2009-10	7,48,503/-
27860346638V	Asian Steel	2009-10	2,79,000/-
27950562074V	S S Enterprises	2009-10	7,09,677/-
27450680107V	Dhiren Mercantile Pvt Ltd.	2009-10	24,90,806/-
27540680106V	Anshu Mercantile Pvt. Ltd	2009-10	34,20,995/-
27240652044V	K V Trading Co	2009-10	4,97,581/-
27770610285V	Sachi Mercantile Pvt. Ltd.	2009-10	7,13,420/-
27750537934V	Mehta Enterprises/Sweta Enterprises	2009-10	1,52,559/-
27870721295V	Mahavir Enterprises	2009-10	4,82,355/-
27160657326V	Swastik Trading Co.	2009-10	6,06,031/-

The A.O further directed the assessee to produce the aforementioned parties, as well as place on record the copy of the ledger accounts, bank statement and details of purchases made from the

aforementioned parties. It was observed by the A.O that in majority of the cases the purchase consideration was outstanding as on 31.03.2010. The A.O issued notices u/s 133(6) to the abovementioned parties, however no reply was received from either of the abovementioned parties. That during the course of the assessment proceedings the assessee though placed on record the copies of the ledger accounts pertaining to the abovementioned parties as well as the bank statement reflecting the payment towards purchase consideration to the said respective parties, but however expressed his inability to produce them for necessary examination before the A.O. The A.O after deliberating on the facts of the case, therein held a conviction that the assessee was neither in a position to produce the aforementioned parties, nor able to verify the purchases made therefrom. The A.O in the backdrop of his aforesaid conviction bifurcated the purchase transactions claimed by the assessee to have been made from the abovementioned parties into two brackets, viz. (i) transactions wherein an amount aggregating to Rs. 94,47,426/- was payable by the assessee on 31.03.2010; and (ii) transactions aggregating to Rs. 19,53,148/- in respect of which payments had been made by the assessee to the aforementioned supplier parties. The A.O held the entire unpaid purchase consideration of Rs. 94,47,426/- (supra) as bogus transactions, while for made an addition @ 12.5% of the purchase consideration of Rs. 19,53,148/- (supra), therein leading to a consequential addition of Rs. 2,44,143/-. The A.O on the basis of his aforesaid deliberations made an addition of an amount aggregating to Rs. 96,91,569/- (i.e. Rs. 94,47,426/- + Rs. 2,44,143/-). The A.O further disallowing an amount of Rs. 2,33,986/- debited by the assessee as bad debts in his profit and loss account for the year under

consideration, therein assessed the income of the assessee at Rs. 1,08,64,690/-.

4. The assessee assailed the order of the A.O in appeal before the CIT(A). The CIT(A) after deliberating on the facts of the case therein agreed with the A.O that the assessee had failed to prove the existence of the supplier parties, and as such had rightly characterized the transactions of purchase of goods claimed by the assessee to have made from the aforementioned parties as bogus transactions. However, the CIT(A) was not persuaded to subscribe to the disallowance of 100% of the alleged purchase consideration of Rs. 94,47,426/- that was claimed by the assessee as payable on 31.03.2010 to the aforementioned supplier parties. The CIT(A) being of the view that now when the corresponding sales pertaining to the aforementioned bogus purchases had not be disproved and dislodged by the A.O, therefore, the entire amount of Rs. 94,47,426/- (supra) could not be disallowed and added to the income of the assessee. The CIT(A) on the basis of his aforesaid view restricted the addition in the hands of the assessee to 12.5% of the entire purchase consideration of Rs. 1,14,00,574/-. The CIT(A) further finding favour with the submissions of the assessee that it had rightly written off the bad debts of Rs. 2,33,986/- in his books of accounts, therein deleted the said addition.

5. The revenue being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The assessee on the other hand had assailed the order of the CIT(A) on the ground that the latter had failed to appreciate that as the A.O had wrongly assumed jurisdiction under Sec. 147, therefore, the assessment framed under Sec. 143(3) r.w.s. 147 being non est and bad in law was liable to be vacated on the

said ground itself. The Learned Departmental Representative (for short 'D.R.') submitted that the A.O being of the view that the assessee had merely inflated the purchases to the extent of the outstanding purchase consideration of Rs. 94,47,426/- (supra), had thus rightly disallowed the said amount in totality. The Ld. D.R. relied on the order of the A.O and submitted that the CIT(A) had erred in restricting the addition to the extent of 12.5% of the total purchases of Rs. 1,14,00,574/- (including Rs. 94,47,426/-). Per contra, the Learned Authorized Representative (for short 'A.R.') for the assessee at the very outset submitted that the CIT(A) had gravely erred in failing to adjudicate the validity of the reassessment order, despite the fact that a specific ground of appeal on the said issue was raised before him. The Ld. A.R. drew our attention to the ground of appeal no. 1 which was raised by the assessee before the CIT(A), but however, the same was not dealt with by him while disposing of the appeal. It was submitted by the Ld. A.R. that the assessee in compliance the notice u/s 148, that was served on him on 02.03.2015, had therein requested vide his letter filed on 29.06.2015 that his original return of income may be treated as the return of income filed in response to the notice u/s 148. It was submitted by the Ld. A.R. that the assessee had thereafter applied for the copy of the 'Reasons to believe' on the basis of which his case was reopened. It was submitted by the Ld. A.R. that the A.O vide his letter dated 23.12.2015 had supplied to the assessee the reasons on the basis of which the case of the assessee had been reopened. The Ld. A.R. placed on our record the copy of the aforesaid letter dated 23.12.2015, and therein submitted that the A.O except for referring to the information which was gathered by his office that the assessee had taken accommodation entries to the extent of Rs. 1,14,00,574/- in the nature of bogus purchases from certain parties,

had therein reopened the case of the assessee. It was submitted by the Ld. A.R. that the A.O had absolutely failed to arrive at an independent *belief* that the income of the assessee chargeable to tax had escaped assessment. It was submitted by the Ld. A.R. that the reasons to believe made available to the assessee merely referred to the information received by his office, while for the entire process of formation of *belief* by the A.O that the income of the assessee chargeable to tax had escaped assessment was found to be seriously missing. It was submitted by the Ld. A.R. that in the absence of the independent formation of *belief* on the part of the A.O at the time of reopening the case of the assessee, the very initiation of the reassessment proceedings stood vitiated. Per contra, the Ld. D.R. vehemently submitted that the letter dated 23.12.2015 was only an extract of the 'reasons to believe' recorded by the A.O, which could be well gathered from the fact that the same were intimated to the assessee by the A.O vide his letter dated 23.12.2015. The Ld. D.R. sought time for placing on record the copy of the 'reasons to believe' on the basis of which the case of the assessee was reopened. The Ld. D.R. had thereafter placed on our record the copy of the 'reasons to believe', dated 27.02.2015 that were recorded by the A.O., which we find will have a strong bearing on the adjudication of the present appeal, are thus being reproduced as under :

“REASONS RECORDED FOR ISSUE OF NOTICE
U/S 148 OF THE INCOME TAX ACT, 1961
IN THE CASE OF ASHIK ALI UNWALA
MARINE MARKETING SERVICES

FOR A.Y. 2010-11
(PAN AAJPU6927H)

Information is received in this office that the above mentioned assessee has taken accommodation entries to the tune of Rs. 11,400,574/- in the nature of bogus purchases from the following parties :

Sr. No.	Tin No.	Name	F.Y.	Amt. In Rs.
1	27200610259V	Surachi Multitrade Private Limited	2009-10	7,67,954/-
2	27100503032V	Deepali Enterprises	2009-10	76,068/-
3	27900588728V	Balaji Trading	2009-10	4,55,625/-
4	27210561220V	National Trading Co	2009-10	7,48,503/-
5	27860346638V	Asian Steel	2009-10	2,79,000/-
6	27950562074V	S S Enterprises	2009-10	7,09,677/-
7	27450680107V	Dhiren Mercantile Pvt Ltd.	2009-10	24,90,806/ -
8	27540680106V	Anshu Mercantile Pvt. Ltd	2009-10	34,20,995/ -
9	27240652044V	K V Trading Co	2009-10	4,97,581/-
10	27770610285V	Sachi Mercantile Pvt. Ltd.	2009-10	7,13,420/-
11	27750537934V	Mehta Enterprises/Sweta Enterprises	2009-10	1,52,559/-
12	27870721295V	Mahavir Enterprises	2009-10	4,82,355/-
13	27160657326V	Swastik Trading Co.	2009-10	6,06,031/-

The above parties are known in the market to be indulging in providing accommodation entries and have been declared by the Maharashtra Sales Tax Department to be indulging in issuing bogus bills for which no goods have been delivered. The above assessee, therefore, by taking bogus purchase bills has understated its/his/her income by this amount.

2. In view above, I have reasons to believe that income to the extent of Rs. 11,400,574/- chargeable to tax has escaped assessment for A.Y. 2010-11. Accordingly, the proceedings u/s 148 of the Act are duly attracted in order to frame proper assessment to bring to tax appropriate income of the assessee including understated income of account of accommodation purchase bills referred to above. It is, therefore, a fit case for issuance of notice u/s 148 of the Act.

3. A notice u/s 148 of the Act is, accordingly, issued to the assessee for A.Y. 2010-11.

Place Mumbai
Date 27.02.2015

Sd/-
(Valli Natarajan)
Income Tax Officer – 20(1)(2)
Mumbai”

6. We have deliberated upon the aforesaid facts of the case and are of the considered view that pursuant to the request of the assessee for making available the copy of the ‘reasons to believe’ on the basis of which his case was reopened, the A.O had only made available an extract of the same. We have deliberated on the copy of the ‘reasons to believe’ placed on record by the Ld. D.R., on the basis of which the

case of the assessee was reopened. We are of the considered view that a perusal of the reasons for reopening which were intimated to the assessee by the A.O vide his letter dated 23.12.2015 are found to be falling seriously short of the actual 'reasons to believe' dated 27.02.2015 on the basis of which the case of the assessee had been reopened. That on a query by the bench as to why the copy of the actual 'reasons to believe' were not made available to the assessee, it was submitted by the Ld. D.R. that there was no obligation cast upon the A.O to make available the copy of the original 'reasons to believe' to the assessee, as such, and an intimation of the basis on which the case had been reopened sufficed the requirement of law. Per contra, the Ld. A.R. strongly objected to the supply of a mere extract of the 'reasons to believe', and therein submitted that nothing could be safely gathered by the assessee on the basis of the extract that was made available to him.

7. We have heard the Ld. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record. We have given a thoughtful consideration to the issue before us and are unable to persuade ourselves to subscribe to the contention of the Ld. D.R. that no obligation was cast upon the A.O to make available the copy of the 'reasons to believe', as recorded, and a mere supply of an extract of the same would duly serve the requirement of law. We are of the considered view that after an assessee had duly complied with the notice u/s 148 and had filed a return of income in compliance thereto, he gets vested with a right to obtain a copy of the 'reasons to believe' on the basis of which his case had been reopened. We are of the considered view that the importance of making available the copy of the 'reasons to believe', as recorded by the A.O, can be well gathered in the backdrop of the fact that after

obtaining the same the assessee can object to the validity of the reopening by filing his objections as regards the same with the A.O. That as held by the **Hon'ble Supreme Court** in the case of **G.K. Driveshaft (India) Ltd. Vs. ITO (2003) 259 ITR 19 (SC)**, the objections filed by the assessee therein assailing the validity of the reassessment proceedings have to be disposed of by the A.O by way of a speaking order, which has to be communicated to the assessee. The underlying purpose of passing of a speaking order and making it available to the assessee is that in case if the assessee is not in agreement with the same, then he remains vested with a right to assail the order of the A.O disposing of the objections by invoking the writ jurisdiction of the Hon'ble High Court. We are of the considered view that the very foundation of the aforesaid process, i.e. filing of objections by the assessee as regards the reasons on the basis of which his case had been reopened would stand seriously frustrated and therein lost, in case the A.O does not make available the copy of the 'reasons to believe', as recorded, and rather dispenses with the said statutory obligation by merely making available an extract of the said reasons. We are unable to persuade ourselves to accept the contention advanced by the Ld. D.R. that supply of an extract of the 'reasons to believe' would duly suffice the statutory obligation as stood cast upon the A.O of making available the reasons to the assessee on the basis of which his case had been reopened.

8. We would now advert to the serious short comings in the extract of the 'reasons to believe' as had been supplied by the A.O, as in comparison to the actual 'reasons to believe' on the basis of which the case of the assessee was reopened, as under :-

- (i) The 'reasons to believe' intimated by the A.O to the assessee vide his letter dated 23.12.2015 is found to be divorced of the very process of formation of *belief* by the A.O.
- (ii) That the date on which the 'reasons to believe' were recorded by the A.O does not find any mention in the 'reasons to believe' intimated by the A.O to the assessee vide his letter dated 23.12.2015.
- (iii) The very application of mind by the A.O to the information received by him that the assessee had obtained accommodation entries from certain parties which had been declared by the Maharashtra Sales Tax Department to be indulging in issuing of bogus bills, was never brought to the notice of the assessee by the A.O vide his letter dated 23.12.2015.

We are of the considered view that independent of the statutory obligation cast upon the A.O to make available the 'reasons to believe', as recorded, to the assessee, even otherwise from a perusal of the aforesaid material difference between the actual 'reasons to believe' as against those which had been intimated to the assessee vide letter dated 23.12.2015, it can safely be concluded that substantial basis and formation of belief by the A.O, for reopening of the case of the assessee had been withheld by the A.O, on the basis of which the very statutory right of the assessee to file objections to the validity of the reopening was not only jeopardised, but rather, we are of a strong conviction that the information intimated to the assessee by the A.O can safely be characterized as misleading. We are of the considered view that the misconceived objections raised by the assessee as regards the non application of mind by the A.O on the basis of an extract of 'reason to believe' as was made available to the assessee by

the A.O, would not had occasioned if in case the complete 'reasons to believe', as recorded, would had been made available to the assessee. Be that as it may, the fact as it so remain is that the A.O had failed to make available the complete 'reasons to believe' on the basis of which the case of the assessee was reopened. We find that a coordinate bench of the **ITAT, 'E' Bench, Mumbai** in the case of **Tata International Ltd. Vs. Dy. CIT (2012) 52 SOT 465 (Mum)** had held that where an assessee had applied for the copy of the 'reasons to believe', then the A.O remains under a statutory obligation to make available the copy of the reasons actually recorded by the A.O as per Sec. 148(2), and the failure on the part of the A.O to furnish the reasons actually recorded for reopening the assessment prior to the completion of the assessment would render the reassessment order passed as invalid. We are persuaded to be in agreement with the view taken by the coordinate bench of the Tribunal and finding no reason to take a different view, therefore, conclude that the failure on the part of the A.O to make available the copy of the original 'reasons to believe', as recorded, therein renders the reassessment proceedings and the order passed by him u/s 143(3) r.w.s. 147 as invalid. We are of the considered view that the order of reassessment passed by the A.O under Sec. 143(3) r.w.s. 147 suffers from a serious legal infirmity, and thus, as observed by us hereinabove, cannot be upheld. We thus in the backdrop of our aforesaid observations quash the order passed by the A.O under Sec. 143(3) r.w.s. 147.

9. That as we have quashed the reassessment proceedings itself, therefore, we refrain from adverting to and adjudicating the grounds of appeal raised by the revenue therein assailing the order of the CIT(A) deleting the additions made by the A.O on merits. The **Grounds of**

Appeal No. 1 to 8 raised by the revenue before us, in the backdrop of our aforesaid observations are thus left open.

10. The appeal of the revenue is disposed of in terms of our aforesaid observations, while for the cross objection raised by the assessee is allowed.

Order pronounced in the open court on 25/10/2017

Sd/-
(Rajendra)
Accountant Member

Sd/-
(Ravish Sood)
Judicial Member

मुंबई Mumbai; दिनांक 25.10.2017

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)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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