

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "C" MUMBAI**

**BEFORE SHRI JOGINDER SINGH (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 20/MUM/2017  
Assessment Year: 2009-10**

Anil Bihani  
12, Kakkad Comm.  
Complex, Below Sun-  
N-Sheel, J.B. Nagar,  
Andheri (E),  
Mumbai-400059.

Vs.

ACIT-24(1),  
6<sup>th</sup> floor, Lalbaug,  
Mumbai.

**PAN No. AADPB1860C**

**Appellant**

**Respondent**

Assessee by : Shri Vijay Mehta, AR  
Revenue by : Shri Rajat Mittal, DR

Date of Hearing : 21/08/2017  
Date of pronouncement : 03/11/2017

**ORDER**

**PER N.K. PRADHAN, A.M.**

This is an appeal filed by the assessee. The relevant assessment year is 2009-10. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-51, Mumbai and arises out of the assessment completed u/s 143(3) r.w.s 147 of the Income Tax Act 1961, (the 'Act').

2. The 1<sup>st</sup> ground raised by the assessee is against the reopening made by the Assessing Officer (AO) u/s 147 of the Act.

3. Briefly stated, the facts of the case are that the assessee filed his return of income for the AY 2009-10 on 26.09.2009 declaring total income of Rs.1,59,43,597/-. The AO made the assessment u/s 143(3) determining the total income at Rs.1,60,64,520/-. Subsequently, he received information from the Director General of Income Tax (Inv.), Mumbai that the assessee had inflated the purchases by obtaining bogus bills from the hawala parties without delivery of goods. On that basis the AO reopened the assessment by issuing notice u/s 148. In appeal, the Ld. CIT(A) confirmed the reopening made by the AO.

4. Before us, the Ld. counsel of the assessee relies on the judgment of the Hon'ble Delhi High Court in *PCIT vs. Meenakshi Overseas Pvt. Ltd.* 395 ITR 677 and *Signature Hotels Pvt. Ltd. vs. ITO* 338 ITR 51. Also he relies on the order of the ITAT, Mumbai in (i) *Ajay J Doshi vs. ITO* in ITA No. 121/Mum/2015 dated 31.05.2017, (ii) *ITO vs. Shapoorji Pallonji & Co.* in ITA No. 5766/Mum/2013 and 5567/Mum/2013 dated 10.04.2015.

5. On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

6. We have heard the rival submissions and perused the relevant materials on record. We begin with the decisions relied on by the Ld. counsel. In *Meenakshi Overseas Pvt. Ltd.* (supra), the Hon'ble High Court held:

“36. In the present case, as already noticed, the reasons to believe contain not the reasons but the conclusions of the AO one after the other. There is no independent application of mind by the AO to the tangible material which forms the basis of the reasons to believe that income has escaped assessment. The conclusions of the AO are at best a reproduction of the conclusion in the investigation report. Indeed it is a 'borrowed satisfaction'. The reasons fail to demonstrate the link between the tangible material and the formation of the reason to believe that income has escaped assessment.”

6.1 In *Signature Hotels Pvt. Ltd.* (supra), the Hon'ble High Court held:

“15. The aforesaid reasons do not satisfy the requirements of section 147 of the Act. The reasons and the information referred to is extremely scanty and vague. There is no reference to any document or statement, except the annexure, which has been quoted above. The annexure cannot be regarded as a material or evidence that prima facie shows or establishes nexus or link which discloses escapement of income. The annexure is not a pointer and does not indicate escapement of income. Further, it is apparent that the Assessing Officer did not apply his own mind to the information and examine the basis and material of the information. The Assessing Officer accepted the plea on the basis of vague information in a mechanical manner. The Commissioner also acted on the same basis by mechanically giving his approval. The reasons recorded reflect that the Assessing Officer did not independently apply his mind to the information received from the Director of Income-tax (Investigation) and arrive at a belief whether or not any income had escaped assessment.”

6.2 In *Ajay J Doshi* (supra), the assessee-HUF earned short term capital gains, long term capital gains and also income from other sources. The AO issued notice u/s 148 for reopening the assessment

after a lapse of more than four years from the end of the relevant assessment year.

6.3 In *Shapoorji Pallonji & Co.* (supra), the Ld. CIT(A) held the reassessment proceedings initiated by the AO by issuing notice u/s 148 as invalid by opining the same in routine manner on the basis of borrowed satisfaction. The Revenue being aggrieved by the order of the Ld. CIT(A) filed appeal before the Tribunal stating that he failed to appreciate the fact that the initiation was on the basis of statement of Shri Nilesh Thakur and other materials which were contrary to the facts stated by the assessee. The ITAT upheld the order of the Ld. CIT(A).

7. Now we come to the reasons for our decision. At this juncture we come across a catena of precedents on the instant issue. In order to avoid prolixity, we refer below to only a few decisions.

Assessee must disclose all primary facts fully and truly. The words 'omission or failure to disclose fully and truly all material facts necessary for his assessment for that year' postulate a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. There can be no doubt that the duty of disclosing all the primary facts relevant to the decision on the question before the AO lies on the assessee as held in *Calcutta Discount Co. Ltd. vs. ITO* (1961) 41 ITR 191, 200 (SC), *Malegaon Electricity Co. P. Ltd. vs. CIT* (1970) 78 ITR 466 (SC), *CIT vs. Bhanji Lavji* (1971) 79 ITR 582 (SC), *CIT vs. Burlop Dealers Ltd.* (1971) 79 ITR 609 (SC), *ITO vs. Lakhmani Mewal*

*Das* (1976) 103 ITR 437, 445 (SC), *Associated Stone Industries (Kotah) Ltd. vs. CIT* (1997) 224 ITR 560, 572 (SC).

Every disclosure is not and cannot be treated to be a true and full disclosure. A disclosure may be a false one or true one. It may be a full disclosure or it may not be. A partial disclosure may very often be a misleading one. In *Shri Krishna (P.) Ltd. vs. ITO* [1996] 87 Taxman 315 (SC) it has been held that what is required is a full and true disclosure of all material facts necessary for making assessment for that year.

Where transaction itself, on basis of subsequent information, is found to be bogus transaction, mere disclosure of that transaction at the time of original assessment proceedings cannot be said to be a disclosure of the 'true' and 'full' facts and the ITO would have jurisdiction to reopen concluded assessment in such a case as held in *Phool Chand Bajrang Lal vs. ITO* [1993] 203 ITR 456 (SC).

In a recent decision the Hon'ble Gujarat High Court in *Peass Industrial Engineers (P.) Ltd. vs. DCIT* (2016) 73 taxmann.com 185 (Guj) has held that:

"Where after scrutiny assessment, Assessing Officer received information from investigation wing that two well known entry operators of country provided bogus entries to various beneficiaries, and assessee was one of such beneficiary, Assessing Officer was justified in reopening assessment."

In a similar case involving beneficiary of accommodation entries, the Hon'ble Bombay High Court in the case of *Om Vinyls P. Ltd. vs. ITO* [Writ Petition (L) No. 3114 of 2014] has held that:

“The information received by the Assessing Officer on which basis the impugned notice is issued is specific. There is no ambiguity in the information which would require investigation. The information of accommodation entries has been given by a participant and this is reason enough to believe that income chargeable to tax has escaped assessment. At this stage, the Assessing Officer is not required to conclusively prove that the reasons in support of the impugned notice establish that the petitioner has taken accommodation entries. This is a matter which would be subject of further investigation during the reassessment proceedings. At that stage it would be open to the petitioner to raise all permissible defences and also to insist on cross examination of the persons who have made a statement implicating the petitioner in having participated in taking accommodation entries. However these are subject matters of investigation into adjudicatory facts and this Court would not in the present facts at the very threshold prevent the Assessing Officer from making further enquiry into a prima facie view which has been formed in the reasons indicated in support of the impugned notice ”

7.1 After examining the present factual matrix on the anvil of the aforesaid enunciation of law, we dismiss the 1st ground raised by the assessee against the reopening done by the AO u/s 148 of the Act.

8. The 2<sup>nd</sup> ground raised by the assessee in this appeal is that the Ld. CIT(A) erred in restricting the disallowance to 12.5% of the purchases of Rs.10,68,83,659/- on an estimate without any supporting evidence as unexplained expenditure u/s 69C.

9. The AO received information from the Director General of Income Tax (Inv.), Mumbai that during the year under consideration the assessee had entered into hawala transactions for purchases of Rs.10,68,83,659/- from the following parties:

S. No.	Name of the supplier	TIN	Amount (In Rs.)
1.	Siddivinayak Trading Company	27830560491V	40,413,720
2.	Manav Impex	27280504194V	63,892,556
3.	Savita International	27460654736V	25,77,383
<b>Total</b>			<b>106883659</b>

The AO during the course of assessment proceedings requested the assessee to produce the above parties and also to furnish copy of ledger account, invoice, delivery challan, lorry receipts, bank statement, octroi receipts, goods receipts, note on tally between sales and purchases and note on stocks. In response to it the assessee filed a written submission enclosing invoice of suppliers of goods, ledger account of the parties, proof of payments and particulars of delivery challan.

The assessee failed to produce the parties though requested by the AO. The AO then deputed the Inspector of Income Tax to make enquiry and submit a report. The Inspector having carried out the enquiry reported that the above parties were not in existence at the given address and as per information the said parties never carried out business from the said address.

In view of the above, the AO made a disallowance by estimating profit @ 25% on such bogus purchases of Rs.10,68,83,659/- u/s 69C. The AO disallowance thus comes to Rs.2,67,20,914/-.

10. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A) considering the totality of circumstances restricted the disallowance to 12.5% of the said bogus purchases of Rs.10,68,83,659/-.

11. Before us, the Ld. counsel of the assessee files a copy of the written submission made by him before the AO and the Ld. CIT(A). He also files a copy of the computation of income, balance sheet and profit and loss account for the year ended 31.03.2009. The Ld. counsel also relies on the decision in (i) *CMS Info Systems P. Ltd. vs. DCIT* in ITA No. 5038/Mum/2014 dated 24.06.2016, (ii) *Madhukant B Gandhi vs. ITO* in ITA No. 1950/Mum/2009 dated 23.02.2010, (iii) *Mehul K Mehta vs. ITO* in ITA No. 3227/Mum/2016 dated 14.03.2017 and (iv) *Ratnagiri Stainless Pvt. Ltd. vs. ITO* in ITA No. 4463/Mum/2016 dated 04.04.2017.

12. On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A). He submits that in spite of being given reasonable opportunity, the assessee failed to produce the parties before the AO for examination. The Inspector deputed by the AO has given a report that the above parties were not in existence in the given address and such parties never carried out such business in the said address. Thus it is submitted by him that the Ld. CIT(A) has rightly restricted the disallowance to 12.5% of such bogus purchases of Rs.10,68,83,659/-.

13. We have heard the rival submissions and perused the relevant materials on record. We discuss below the decisions relied on by the Ld. counsel of the assessee.

In *CMS Info Systems P. Ltd.* (supra), the Tribunal held that by submitting documentary evidence of purchase, consumption and sale of computer components, the assessee has discharged its burden of proof. The AO had not produced any evidence that could prove the non-

genuineness of the transaction. Therefore, the Tribunal allowed the appeal of the assessee.

In *Madhukant B Gandhi* (supra), relating to a case of bogus purchase, the Tribunal adopted net profit @ 5%.

In *Mehul K Mehta* (supra), relating to case of bogus purchase, the Tribunal adopted GP ratio of 12.5% on alleged bogus purchases and also granted credit of GP ratio of 7.11% declared on these bogus purchases in the return of income filed with the Revenue.

In *Ratnagiri Stainless* (supra), relating to a case of bogus purchase, the Tribunal adopted GP ratio of 12.5% on alleged bogus purchases and also granted credit of GP ratio declared on these bogus purchases in the return of income filed with the Revenue.

13.1 We find that there is no basis of estimating the net profit @ 12.5% on the alleged bogus purchases of Rs.10,68,83,659/- as done by the Ld. CIT(A).

A proper hearing must always include a 'fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view. Cross-examination is allowed by procedural rules and evidently also by the rules of natural justice. Any witness who has been sworn on behalf of any party is liable to be cross-examined on behalf of the other party to the proceedings.

The Hon'ble Supreme Court in *State of Kerala vs. K.T. Shaduli Grocery Dealer* AIR 1977 SC 1627, recognised the importance of oral evidence by holding that the opportunity to prove the correctness or

completeness of the return necessarily carry with it the right to examine witnesses and that includes equally the right to cross-examine witnesses.

In *ITO vs. M. Pirai Choodi* (2012) 20 taxmann.com 733 (SC), the Hon'ble Supreme Court has held that "Order of assessment passed without granting an opportunity to assessee to cross-examine, should not have been set aside by High Court; at most, High Court should have directed Assessing Officer to grant an opportunity to assessee to cross-examine concerned witness."

In a similar case of a beneficiary of accommodation entries, their Lordships of the Hon'ble Bombay High Court in the case of *Om Vinyls P. Ltd. (supra)* have observed that it would be open to the assessee to raise all permissible defences and also to insist on cross-examination of the persons who have made a statement implicating the assessee in having participated in taking accommodation entries.

13.2 In view of the above position of law, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a fresh assessment after examining the concerned parties and giving opportunity of cross-examination to the assessee. We direct the assessee to file the relevant documents/evidence before the AO. Needless to say, the AO would give reasonable opportunity of being heard to the assessee before finalizing the assessment order.

Thus the 2<sup>nd</sup> ground of appeal is allowed for statistical purposes.

14. In the result, the appeal is partly allowed.

**Order pronounced in the open Court on 03/11/2017.**

Sd/-  
(JOGINDER SINGH)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 03/11/2017

*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**