

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

**BEFORE SHRI D.T. GARASIA (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 937/MUM/2016
Assessment Year: 2009-10**

&

**ITA No. 938/MUM/2016
Assessment Year: 2010-11**

&

**ITA No. 939/MUM/2016
Assessment Year: 2011-12**

M/s Dixit Processors,
H. No. 1581, New Kaneri,
Near Jain Compound, Kalyan Road,
Bhiwandi-421302.

ITO-1(1)
Kalyan

Vs.

PAN No. AAefd1227G
Appellant

Respondent

Assessee by : Dr. P. Daniel, AR
Revenue by : Mr. V. Vidhyadhar, DR

Date of Hearing : 23/01/2018
Date of pronouncement : 31/01/2017

ORDER

PER N.K. PRADHAN, A.M.

The captioned appeals filed by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-2, Thane and arise out of the assessment completed u/s 143(3) r.w.s. 147 of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are

proceeding to dispose them off through a consolidated order for the sake of convenience.

2. The 1st ground raised by the assessee is that the Ld. CIT(A) erred in confirming the reopening of validly completed assessment u/s 147 of the Act.

3. Briefly stated the facts of the case are that the assessee filed its return of income for the AY 2009-10 on 29.09.2009, declaring income at Rs. Nil. The AO made the assessment u/s 143(3) on 21.11.2011 determining total loss at Rs.48,03,519/-.

For the AY 2010-11, the assessee filed its return of income on 30.09.2010, declaring income at Rs.8,55,162/-. The AO completed the assessment u/s 143(3) on 19.06.2012 determining the total income at Rs.11,27,030/-.

For the AY 2011-12 the assessee filed its return of income on 30.09.2011, declaring income at Rs.15,65,595/-. The same was processed u/s 143(1) of the Act.

Subsequently, the AO received information from the Sales Tax Department, Government of Maharashtra that the assessee had obtained bogus purchase bills amounting to Rs.21,22,255/- in FY 2008-09, Rs.72,74,899/- in FY 2009-10 and Rs.47,53,932/- in AY 2010-11.

In view of the above information, the AO re-opened the assessment by issuing notice u/s 148 on 25.03.2013 for the AY 2009-10, and on 30.07.2013 for AY 2010-11.

4. Before us, the Ld. counsel of the assessee submits that the order passed by the AO u/s 143(3) r.w.s. 147 in pursuance to the illegally issued notice u/s 148 may be deleted.

On the other hand, the Ld. DR supports the order passed by the AO.

5. We have heard the rival submissions and perused the relevant materials on record. We find that there was specific information from the Sales Tax Department, Government of Maharashtra, that the assessee had obtained bogus purchase bills amounting to Rs.21,22,255/- in FY 2008-09, Rs.72,74,899/- in FY 2009-10 and Rs.47,53,932/- in AY 2010-11.

We further find that the notice u/s 148 has been issued by the AO within a span of four years from the end of the relevant assessment year.

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) held :

“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] held :

“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 ”

5.1 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.

6. The 2nd ground is that the Assessing Officer (AO) erred in not disposing of the objections filed before the completion of assessment

thereby violating the principles laid down in the decision of the Apex Court in *GKN Drive Shafts Ltd. v. ITO* 259 ITR 19 (SC).

We find that the above ground of appeal was not filed before the Ld. CIT(A). All the more, during the course of hearing, the Ld. counsel has not placed before us documents indicating that the AO failed to dispose of the objections filed by the assessee against reopening before the completion of assessment. We also find that the 'Paper Book' filed by the assessee does not contain any such document.

In view of the above, we dismiss the 2nd ground of appeal.

7. The 3rd ground raised by the assessee in this appeal is that the Ld. CIT(A) erred in confirming the addition of Rs.21,22,255/- (AY 2009-10) Rs.72,74,899/- (AY 2010-11) and Rs.47,53,932/- (AY 2011-12) as alleged bogus purchases made by the AO without providing the persons for cross-examination and accepting the information received from the Sales Tax Department as gospel truth.

8. In a nutshell, the facts are that the Revenue conducted a survey u/s 133A in the business premises of the assessee on 18.02.2013 and recorded a statement on oath from Shri Jignesh Himmatlal Shah, partner of the assessee-firm. The AO has mentioned in his assessment order that in response to question no. 13 regarding bogus purchases of Rs.21,22,255/- (AY 2009-10), Rs.72,74,899/- (AY 2010-11) and Rs.47,53,932/- (AY 2011-12), Shri Shah has offered the above amount for taxation in the relevant assessment years. However, after the survey

proceedings, the assessee had retracted the disclosure of additional income by submitting an affidavit.

The AO has noted that the assessee failed to produce the above parties before him for verification.

The AO, therefore, relying on the information received from the Sales Tax Department made an addition of Rs.21,22,255/- (AY 2009-10), Rs.72,74,899/- (AY 2010-11) and Rs.47,53,932/- (AY 2011-12) towards bogus purchases.

9. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A) agreed with the reasons given by the AO and dismissed the appeal filed by the assessee.

10. Before us, the Ld. counsel of the assessee files a 'Paper Book' containing *inter alia* the ledger account of the parties, copy of FIR dated 23.02.2012 having records destroyed in fire, copy of statement recorded u/s 133A dated 18.02.2013, copy of retraction (affidavit) dated 08.03.2013, details of opening stock & closing stock, quantitative statement of stock processed, statement of item-wise monthly stock, statement of monthly purchase and sale.

Reliance is placed by the Ld. counsel on the affidavit dated 08.03.2013.

11. *Per contra*, the Ld. DR relies on the order passed by the Ld. CIT(A) confirming the addition made by the AO towards bogus purchases. He

also refers to the result of the survey dated 18.02.2013 conducted by the Revenue in the business premises of the assessee.

12. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

There is merit in the above ground of appeal of the assessee that the Ld. CIT(A) erred in confirming the above additions made by the AO without providing to the assessee an opportunity for cross-examination. In the ground of appeal before the Ld. CIT(A), the assessee had requested for an opportunity for cross-examination. We find that the Ld. CIT(A) has not decided on the issue of allowing the assessee an opportunity to cross-examine the parties.

In *Mehta Parikh & Co. v. CIT*, 30 ITR 181 (SC), it has been held by the Hon'ble Supreme Court that cross-examination of the deponent is necessary to challenge the statements made by him in the affidavit. Rejection of an affidavit is not justified unless the deponent has either been discredited in cross-examination or has failed to produce other supporting evidence when called upon to do so.

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.

12.1 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 and the correct address of the parties before the AO. Needless to say, the AO would give

reasonable opportunity of being heard to the assessee before finalizing the assessment order.

12.2 Thus the 3rd ground of appeal filed by the assessee is allowed for statistical purposes.

13. In the result, the appeals are partly allowed.

Order pronounced in the open Court on 31/01/2018

Sd/-
(D.T. GARASIA)
JUDICIAL MEMBER

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

Mumbai;

Dated: 31/01/2018

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