

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

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 5052/MUM/2016
Assessment Year: 2011-12**

Shri Ajay Narayan Bhoir,
Vishnu Compound,
Assbibi, Kalyan Road,
Bhiwandi-421302

Vs. Asst. Commissioner of
Income Tax Circle-1,
Kalyan.

PAN No. AATPB1608A

Appellant

Respondent

Assessee by : Mr. S.M. Makhija, AR
Revenue by : Mr. V. Vidhyadhar, DR

Date of Hearing : 03/04/2018
Date of pronouncement : 25/04/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-2, Thane [in short 'CIT(A)'] and arises out of the assessment completed u/s 143 (3) r.w.s. 147 of the Income Tax Act 1961, (the 'Act').

2. Broadly stated, the assessee/appellant has raised two grounds of appeal. The 1st one is against the order of the Ld. CIT(A) confirming the reopening made by the Assessing Officer (AO) u/s 147 of the Act. The 2nd ground is against the order of the CIT(A) estimating profit @ 25% out of

alleged hawala purchases of Rs.25,74,568/- which comes to Rs.6,43,642/-.

3. We begin with the 1st ground of appeal. The facts of the case are that the assessee filed his return of income for the AY 2011-12 on 29.09.2011 disclosing a total income of Rs.69,49,784/-. The same was processed by the AO u/s 143(1) of the Act. Subsequently, the Assessing Officer (AO) received information from the Sales Tax Department, Government of Maharashtra that certain accommodation-entry providers had given entries and that no goods as mentioned in the purchase bills issued by them were in fact delivered to the beneficiaries. In the case of the assessee, the entry providers were as under:

Sr. No.	Name of the Party	TIN	Amount (Rs.)
1.	L.P. Traders	27210283994V	131061
2.	Shree Amaaya Enterprises	27240257545V	538125
3.	S.P. Corporation	27270583788V	54705
4.	Dev Enterprises	27450526556V	798105
5.	Meridian Trading Co.	27580726450V	568890
6.	Sun Shine International	27880622010V	237510
7.	Amrish Traders	27960764459V	246171
		Total	2574568

In view of the above facts, the AO issued notice u/s 148 dated 20.06.2013 which was duly served on the assessee.

3.1 In the present case, the return of income filed by the assessee was processed u/s 143(1). In the case of *ACIT v. Rajesh Jhaveri Stock Brokers P. Ltd.* 291 ITR 500 (SC), it has been held that intimation u/s 143(1)(a) is not an assessment and a notice u/s 148 issued was valid. In *Kone Elevator India P. Ltd. v. ITO* (Mad) 340 ITR 454, *CIT v. Ideal Garden Complex P. Ltd.* (Mad) 340 ITR 609 and *ACIT v. Maersk Global Services*

Centre (India) (P) Ltd. (ITAT, Mum) 66 DTR 90, it has been held that in case of return of income processed u/s 143(1), the only condition to be satisfied for reopening is taxable income has escaped assessment and the assessee's plea that no fresh material was there before the AO warranting re-opening, is not relevant.

In view of the above position of law, we uphold the re-opening made by the AO by issuing notice u/s 148 of the Act.

4. Now we turn to the 2nd ground of appeal. During the course of assessment proceedings, the AO asked the assessee to file details in respect of purchases made from the abovementioned parties. The AO, having gone through the details filed by the assessee noticed that the said transactions were not properly supported by relevant documents such as transportation bills, delivery challans, goods receiving note, octroi receipt etc.

Subsequently, the AO issued notice u/s 133(6) to the abovementioned parties asking them to produce the details of transactions they had with the assessee. But these notices were returned unserved by the postal authorities. Therefore, the AO treated the purchases made from the above parties as unsubstantiated and made an addition of Rs.25,74,768/-.

5. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) relying on the decision in *Vijay Proteins Ltd. v. ACIT* 58 ITD 428 (Ahd), *Sanjay Oil Cakes Industries v. CIT* (2008) 316 ITR 274 (Guj), restricted the disallowance to Rs.6,43,642/- (@ 25% of Rs.25,74,568/-).

6. Before us, the Ld. counsel of the assessee *vide* the grounds of appeal submits that (i) the Ld. CIT(A) erred in confirming the order of the AO not providing documentary evidence and cross-examination of the so-called hawala dealer or bogus supplier of goods which had been sought by the appellant during the course of assessment proceedings, (ii) the Ld. CIT(A) erred in rejecting the books of accounts u/s 145(3) without issuing a show cause notice to the appellant nor providing an opportunity of hearing, (iii) the Ld. CIT(A) erred in estimating the profit without furnishing to the appellant the material on which the rate of gross profit was arrived at or without giving an opportunity to the assessee to rebut it (iv) the Ld. CIT(A) erred in not applying any scientific method or comparative net profit of similar type of business at the time of determining the net profit of the appellant after rejecting the books of account.

Further, the Ld. counsel files a Paper Book containing the decision in *M/s Andaman Timber Industries v. Commissioner of Central Excise Kolkata-II* (SC) (Civil Appeal No. 4228 of 2006); *H.R. Mehta v. The ACIT, Mumbai* (Bom.) (ITA No. 58 of 2001); *CIT-13 v. Ashish International* (Bom.) (ITA No. 4299 of 2009); *Income Tax Officer 25(3)(2), Mumbai v. Deepak Poptalal Gala* (ITA Bench – D, Mumbai) ITA No. 592/Mum/2013 dated 27.03.2015; *Hiralal Chunnilal Jain v. Income Tax Officer* (ITAT Mumbai 'H' Bench) ITA No. 457/Mum/2014, ITA No. 2545/Mum/2014 and ITA No. 1275/Mum/2014.

7. On the other hand, the Ld. DR submits that the notices issued by the AO u/s 133(6) were returned back as unserved by the postal

authorities. These notices carried the address provided by the assessee to the AO. Also it is stated that the assessee failed to file before the AO the relevant documents such as transportation bills, delivery challans, goods received note, octroi receipt etc. Thus, the Ld. DR supports the order passed by the Ld. CIT(A) estimating the profit @ 25% on the said purchases of Rs.25,74,568/-.

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

In the case-laws referred to by the Ld. counsel of the assessee, the applicability of cross-examination has been emphasized. In the present appeal as mentioned hereinbefore the notices issued by the AO to the parties u/s 133(6) were returned back by the postal authorities as unserved. The AO had sent these notices in the address furnished by the assessee. Thus the issue of cross-examination materially cannot step in.

We are of the considered view that the contentious issues in the instant case could be resolved by proper hearing by the AO. 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. PiraiChoodi* (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. vs. ITO* [Writ Petition (L) No. 3114 of 2014] 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.

In view of the above factual scenario, we set aside the order of the Ld. CIT(A) on the above issue and restore the matter to the file of the AO to make a *de novo* order after examining the parties mentioned at para 3 hereinbefore and allowing cross-examination to the assessee. It is the duty of the assessee to file before the AO the recent address of the above parties. 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 fresh order.

As the matter has been restored to the file of the AO for fresh adjudication, we are not adverting to the case-laws relied on by the Ld. counsel.

Thus the 2nd ground of appeal is allowed for statistical purposes.

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

Order pronounced in the open Court on 25/04/2018

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

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

Mumbai;

Dated: 25/04/2018

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