

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, HON'BLE JUDICIAL MEMBER AND  
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER**

**ITA.No.2259/MUM/2016(A.Y: 2009-10)**

Shri Urvish B. Mehta C-201, Mahu Vihar, Behind Patel Nagar, M.G.Road, Kandivali (W) Mumbai – 400 067  <b>PAN NO: AEYPM 0416 N</b>	v.	I.T.O., Ward – 25(3)(4) Aayakar Bhavan, M.K. Road, Mumbai-400 020
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA.No. 1352/MUM/2016 (A.Y: 2009-10)**

I.T.O., Ward – 33(3)(3) R.No. 603, C-12, Pratyakshkar Bhavan Bandra Kurla Complex, Mumbai – 400 051	v.	Shri Urvish B. Mehta C-201, Mahu Vihar, Behind Patel Nagar, M.G. Road, Kandivali (W) Mumbai – 400 067  <b>PAN NO: AEYPM 0416 N</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

**Assessee by : Shri Sashi Tulsian**

**Revenue by : Shri D.G. Pansari**

**Date of Hearing : 17.09.2018**

**Date of Pronouncement : 10.10.2018**

**ORDER****PER RAJESH KUMAR (AM)**

(1) These cross appeals are filed by the assessee and the Revenue are arising out of the order passed by the Learned Commissioner of Income Tax (Appeals) [hereinafter referred as Ld.CIT(A)] dated 30.12.2005 which in turn is arising out of the order of the Assessing Officer [hereinafter called as Ld.AO] passed u/s. 143 r.w.s. 147 of the Act.

(2) The grievances of the assessee is qua illegal and invalid reopening of assessment and wrong confirmation of disallowance to the tune of ₹.90,52,125/- towards bogus purchases, whereas the grievance of the Revenue is qua the reduction of addition to ₹.90,52,125/- out of total addition of ₹.11,31,51,580/- on account of bogus purchases.

(3) First we take up the appeal of the assessee. The assessee has filed additional grounds of appeals. The first three additional grounds raised by the assessee are against the jurisdiction of the AO to reopen the assessment u/s. 147 of the Act without any independent application of mind, merely based upon the change of opinion and without any live link between the materials relied by the AO and escapement of income.

(4) Facts in brief are that the assessment was framed u/s. 143(3) of the Act on 24.11.2011 assessing the income of ₹.12.69,050/- against the returned the income of ₹.11,94,930/- and the only addition was made of ₹.74,120/- towards disallowance of certain expenses. Thereafter, the Assessing Officer received information that assessee has received some bogus purchase entries from thirteen parties aggregating to ₹.11,31,51,580/- the details whereof were given in Para No.2 of the Assessment Order and the said information was supplied by the Sales Tax Department to DGIT (inv) who in turn supplied the same to the assessee. The Assessing Officer observed from the Sales Tax Department website of Mumbai, Government of Maharashtra that Sales Tax Department has carried detailed enquiries in respect of the said 13 parties and also recorded their statements/depositions or affidavits. The Assessing Officer extracted the copies of the statements/depositions/ affidavits from the website of the Sales Tax Department and came to the conclusion that assessee has not purchased any actual goods or services from the above parties as they were only engaged in issuing bogus bills on commission basis. Accordingly, the case of the assessee was reopened u/s. 147 of the Act by issuing notice u/s. 148 of the Act dated 25.03.2013 which was complied by the assessee vide letter dated

03.04.2013 submitting that original return filed may be treated as return filed in compliance to the notice u/s. 148 of the Act.

(5) Assessee has challenged the issue of notice and contested the reopening of assessment before the Assessing Officer. However, the Assessing Officer brushed aside the contentions of the assessee on the ground that the bogus purchases were amply proved by the documents downloaded from the Sales Tax Department website which proved that all the thirteen parties were engaged in the supplying of bogus bills on the commission basis and accordingly issued show cause notice to the assessee as to why the purchases to the tune of ₹.11,31,51,580/- should not be treated as unexplained expenditure. Assessing Officer finally after considering the various contentions of the assessee framed assessment u/s. 143(3) r.w.s. 147 of the Act vide order dated 21.03.2014 assessing income of ₹.11,44,20,630/- by making addition u/s. 69C of the Act on entire purchases to the tune of ₹.11,31,51,580/-.

(6) In the Appellate proceedings assessee did not challenge the reopening of assessment which is being challenged for the first time by filing additional grounds of appeal before this tribunal. The Ld.AR vehemently submitted before the Bench that the reopening of assessment u/s.147 r.w.s. 148 of the Act which already completed

u/s.143(3) of the Act is a legal issue arising out of the assessment records which were before the Authorities below and does not require any verification of facts and therefore this ground is purely legal and deserved to be admitted. Ld.AR has relied upon the decision of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT [299 ITR 382 (SC)]. Where the question of law arising from the facts which are on record in the Assessment Proceedings, there is no reason on the such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. Thus, the Learned Counsel for the assessee submitted that in view of the Hon'ble Apex Court decision where all the facts of the case are on record and Tribunal is only required to consider a question of law arising from the facts, the Tribunal has jurisdiction to examine the same which arising from the facts before the authorities below and decide the case on merits, although the grounds were not raised before. Finally, the Ld. Counsel for the assessee prayed that the same should be admitted and adjudicated as per provisions of law.

(7) Ld.DR on the other hand opposed the additional ground filed by the assessee, on the ground that the same was not raised before the Ld.CIT(A) and was raised for the first time before the Tribunal.

(8) Hearing both the parties and perusing the material on record, we observe that the legal issue challenged by the assessee for the reopening of assessment is raised out of the facts on record which were not raised before the Authorities below and therefore we are inclined to admit the same pursuant the ratio laid down by the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. v. CIT (supra).

(9) The reasons recorded by the Id.AO for reopening of assessment are reproduced as under: -

The assessee filed his return of Income electronically on 30.09.2009 declaring total income of Rs.11,94,930/-. Thereafter, assessment in the case of the assessee was completed u/s 143(3) of the I.T.Act-1961 on 24.11.2011 whereby total income of the assessee was assessed at Rs. 12,69,050/- after making disallowance on account of certain expenses being personal in nature and for want of verification.

From the assessment records, it was revealed that the assessee had shown purchases of Rs. 38,05,48,216 in his profit & loss account. In this case, information is received from the Office of the D.G.I.T. (Inv.), Mumbai that the assessee made purchases from the following parties who indulge in issuing only bills without any goods or materials for a commission, as per the official website of the Sales Tax Department, Government of Maharashtra. [www.mariavat.gov.in](http://www.mariavat.gov.in).

Sr. No.	TIN of party from which purchases made	Name of the Party	Amount of purchases
1	27560404324V.	JIGAN- ENTERPRISES	16844356
2	27970657220V	BIG TRADE AGENCY	317790
3.	27950092109V	GHATALIA STEELS /DIVINE ENTERPRISES	201110
4.	27930682074V	ADINATH TRADING COMPANY	1058765
5	27710615362V	PARSHVA&CO	17011967
6	27560556517V	MAHAVIR ENTERPRISES	17810098
7	27370682867V	HITECH IMPEX	853744
8	27310540795V	OM CORPORATION	3216473
9	27240608588V	HARSH CORPORATION	717241
10	27140610389V	DAKSH ENTERPRISES	9862360
11	27120372265V	TOP SHOP TRADING COMPANY PVT LTD	19268022
12	27030540755V	NAGESHWAR ENTERPRISES	11471427
13	27450374751V	NIKHIL ENTERPRISE	14518227
	Total		11,31,51,580/

From the Sales Tax Website of Mumbai, Govt. of Maharashtra, it was revealed that Sales Tax Department had carried on detailed enquiries in respect of all the above thirteen parties and took/ recorded statement, *deposition*, affidavit etc. of main persons of above concerns which established that these thirteen concerns are into providing bogus bills. The statements / deposition / affidavits of the above thirteen parties recorded by the Sales Tax Department were extracted from the Sales Tax Website and on perusal of the same, it is established that no actual goods' or services are delivered by these parties to their customers and they issued bogus bills after charging small commission.

In the present case, assessee purchased goods worth Rs.11,31,51,580/- from above thirteen parties. In view of detailed enquiries made by the Sales Tax Department it is evident that the assessee took bogus bills worth Rs. 11,31,51,580/- at least from above thirteen parties to inflate his purchases. The details like deposition, affidavit, enquiry report, statement, other enquiries etc. extracted from the Sales Tax Website and other information received from the DG1T (Inv.), Mumbai is enclosed as per Annexure 'A'. So I have reason to believe that income chargeable to tax has escaped assessment for A.Y. 2009-10 in the case of the assessee. Notice under section 148 of the I.T. Act, 1961 is issued to the assessee."

(10) Ld. AR submitted before the Bench that it is the basic requirement of law for reopening of assessment that Assessing Officer must apply his mind on material coming in its possession in order to entertain and form a belief that assessable income of the appellant has escaped assessment. Ld.AR submitted that from the reasons recorded it is clear and evident that Assessing Officer has not applied his mind independently on the material in his possession to show that having applied his mind to the said material he has satisfied himself that there were reasons to belief that income has escaped assessment. The Ld.AR stated that the Assessing Officer has only relied on the information received from the DGIT (Inv.) Mumbai which conveys that as per official website of the Sales Tax Department appellant has made bogus purchases of goods from thirteen parties who are engaged in issuing bogus bills only without supplying any materials.

(11) Ld.AR further stated that the Assessing Officer has further relied on the statements given by thirteen suppliers before sales tax authorities which were extracted from the Sales Tax Department website and on perusal of these statements Assessing Officer came to the conclusion that the appellant had not purchased the goods from the thirteen parties. The Ld.AR argued that the receipt of information from the website of the Sales Tax Department is not enough for reopening of assessment and it is requirement of the law that application of the mind on the said information/ material gathered by the Assessing Officer from external sources is must.

(12) Ld.AR argued that Assessing Officer should have carried independent enquiry before issuing of notice u/s. 148 of the Act which has not been done. The Ld.AR argued that the enquiry by the Sales Tax Department on these 13 suppliers were conducted when they defaulted in paying the sales tax liability and has not complied with the VAT Law. Ld.AR stated that the said parties were tainted parties and the statements given by them were merely an attempt to shift the risk to their customers so that they could escape the liability of paying huge sales tax. The mere reliance on the statements of tainted parties to reopen of assessment u/s. 147 of the Act showed the absence of independent application of mind by the Assessing Officer and therefore the

requirement of law which precede the reopening, i.e application of mind is missing and therefore the recording of reasons to believe is wrong and against the provision of law.

(13) Ld.AR further stated that it is the trite law that the reason to believe should be that of the Assessing Officer and not of any other authorities. In defense of his argument the Ld.AR relied on the series of decisions namely: -

- a. *PCIT v. G & G Pharma India Ltd., [384 ITR 147 (Del)]*
- b. *JCIT v. George Williamson (Assam) Ltd., [258 ITR 0126 (Gau)]*
- c. *Banke Bihari Properties Pvt. Ltd. v. ITO [(2016) 46 CCH 0546 Del Trib dated 22.04.2016]*
- d. *DCIT v. Shri Bharat Chandra Seth in ITA.No. 622/LKW/2014*

(14) Ld.AR prayed for the Bench that since the Assessing Officer has not applied his mind, the reopening as made by the Assessing Officer is not a valid and deserved to be quashed.

(15) Secondly the reopening of assessment cannot be made on mere change of opinion. The Ld.AR submitted that the issue of purchases from these 13 parties were examined in the Assessment Proceedings u/s.143(3) of the Act. In order to reopen the assessment, the Assessing Officer has to record "reasons to believe" that income has escaped assessment. The said reasons to believe have to be formed out of the entirely new material on record on the basis of which the Assessing Officer came to the conclusion that the income has escaped assessment

and that material should be something which was not available with the Assessing Officer during the original Assessment Proceedings. Unless and until it is done the mere reexamining of the records which were available with the Assessing Officer would amount to change of opinion which is not permissible under the Act. In this case, the Assessing Officer has already examined the purchases from time to time during the original Assessment Proceedings. So much so, that notice issued 133(6) of the Act to the suppliers during the original Assessment Proceedings were complied with and are part of the Assessment records which showed that the Assessing Officer has conducted thorough verification of the purchases and only thereafter accepted the genuineness of the transaction by the assessee.

(16) The Learned Counsel for the assessee submitted that having done so the initiation of reopening of assessment u/s. 147 of the Act by merely relying on the borrowed satisfaction reached by some other official on the basis of the statements recorded of the suppliers is not valid under the provisions of the Act. In this case having verified the purchases in the original assessment the Assessing Officer has doubted the same which is the mere change of opinion for which the reopening proceeding could not be validly initiated.

(17) Ld. Counsel for the assessee contended that the concept of change of opinion is a built in test to check abuse of power by the assessing authority to reopen the assessment u/s. 147 of the Act. The Assessing Officer has the power to reassess but no power to review his own orders under the garb of reopening. The Id.AR strongly relied on the series of decisions in defense of his argument: -

- a. *CIT v. Kelvinator India [320 ITR 561 (SC)]*
- b. *Cartini India Ltd. v. Addl. CIT [(2009) 314 ITR 275 (Bom).]*
- c. *Jal Hotels Co. Limited v. Asst. DIT [(2009) 24 DTR 37 (Del.)]*

(18) Therefore, the Learned Counsel for the assessee submitted that even on the ground of change of opinion the reopening of assessment is bad in law and void ab-initio.

(19) Lastly the Ld.AR argued that there is no live link to the material relied upon by the Assessing Officer for reopening of the case of the appellant. The Ld.AR submitted that the Assessing Officer has already verified the genuineness of the transactions during the original Assessment Proceedings and having done so the Assessing Officer has initiated reopening of assessment merely relying on the basis of the statements recorded of the suppliers by the sales tax authorities. The LD.AR further stated that in the said statements, the so called suppliers never uttered a word about the bogus sales bills to the assessee and nowhere assessee name appeared in those statements. Thus, where

the name of the appellant is not appeared in the statement recorded, no live link or even a close nexus established between the said statements and escapement of income. The Ld.AR relied on the series of decisions in support of his contentions: -

- a. *Income Tax Officer v LakhmaniMewaql Das [103 ITR 437]*
- b. *Income Tax Officer v. M/s. Desire Jewels Pvt Ltd., [ITA.No. 136/Mum/2015]*
- c. *Andaman Timber Industries v. CCE [127 DTR 241]*

(20) Finally, the Id.AR prayed for the Bench in view of the said facts, the reopening of assessment by the Id. AO is bad in law and has to be quashed.

(21) Ld. DR on the other hand relied heavily on the order of the Assessing Officer and submitted that the reopening of assessment was validly made by the Assessing Officer on the basis of the material which came to the possession of the Assessing Officer from the DGIT(Inv.), Mumbai who got the information/material from the Sales Tax Department Website, Government of Maharashtra. Ld. DR stated that the thirteen bogus suppliers in their statements before the Sales Tax Authorities candidly admitted that they were engaged in supplying bogus bills on commission basis without supply of any material. Therefore, the Assessing Officer has sufficient and independent material before him to form the belief that income of the assessee has escaped assessment.

Ld. DR prayed for the Bench that the ground raised by the assessee with respect to the reopening of assessment should be dismissed as being devoid of any merit and substance.

(22) We have heard the rival submissions and perused the material on record including the impugned order and the decisions cited by the Ld.AR before us. The undisputed facts are that, the Assessing Officer received information from the DGIT (Inv.) Mumbai who in turn has got the same from the Sales Tax Department. The information was in the form of statements/affidavits which stated that the suppliers admitted before the sales tax authorities that they were engaged in supplying of bogus bills on commission basis. In the said statements, it is nowhere mentioned that the said suppliers have actually supplied bogus bills to the assessee nor the name of the assessee appeared in the said statements/affidavits. After perusal of the reasons recorded, we observed that Assessing Officer has acted merely on the basis of the statements/affidavits of the thirteen parties without carrying on any further verification or independent enquiry before issuing notice u/s. 148 of the Act and thus has completely failed on the duty casted upon him to independently apply his mind on the material received from the DGIT (Inv), Mumbai. The case of the assessee finds force from the decisions cited by the Ld. AR as stated herein above.

*In the case of PCIT v. G & G Pharma India Ltd (supra), the Hon'ble High Court has held that without forming a prima facie belief, on the basis of such material, it was not possible for the Assessing Officer to have simply concluded that "it is evident that the appellant company has introduced its own unaccounted money in its bank by way of accommodation entries". The Hon'ble High Court further held that it is the basic requirement of law that the AO must apply his mind to the materials in order to have reasons to believe that the income of the Appellant escaped assessment which is missing in the present case. The Hon'ble High Court held that unless the basic jurisdictional requirement is satisfied a post mortem exercise of analyzing materials produced subsequent to the reopening will not rescue an inherently defective reopening order from invalidity.*

*In the case of JCIT v. George Williamson (Assam) Ltd. (supra) the Hon'ble Gujarat High Court has held that in the absence of any specific material before the Assessing Authority as to the transactions which had taken place between the assessee and the four parties named above and any material or record to prima facie satisfy the assessing authority that the amount paid by cheques were ultimately returned in cash after routing it through four or five bank accounts, there does not appear to be a link between facts found and the satisfaction arrived at by the assessing authority. Therefore, in the absence of application of mind to the facts alleged to have been found, the decision arrived at that income escaped assessment is not allowable in law.*

(23) We have also found merit in the second limb of the submissions of the assessee that reopening on the basis of the same material which was before the Investigating Officer at the time of original Assessment Proceedings is nothing but a change of opinion which is not permissible

under the law and the concept of change of opinion is a built in test to check the abuse of power to reassess but no power to review under the garb of reopening the Assessment Proceedings is available. The case of the assessee is squarely covered by the ratio laid down by the Hon'ble Supreme Court in the case of CIT v. Kelvinator India(supra) wherein it has been held that the reopening of assessment on the basis of change of opinion is not permissible. Likewise, the case of the assessee is also supported by the various other decision as cited above by the Id.AR.

(24) On the third limb of the submissions of the Ld.AR that there was complete failure on the part of the Assessing Officer to establish a live link between the materials which came to the AO and escaped assessment. In this case we find that that the material was in the form of statements /affidavits etc., which were downloaded from the Sales Tax Department website and Assessing Officer has not established any link as to how the income of the assessee has escaped, as in those statements/ affidavits nowhere the name of the assessee appeared or the suppliers admitted that they supplied bogus bills only to the assessee. But the case of the assessee is supported by the decision of the Apex Court in the case of ITO v. Lakmani Mewal Das (supra) in which the Hon'ble Apex Court has held that on the basis of confession

the notice u/s. 148 cannot be issued. The Hon'ble Supreme Court has held that the power of Income Tax Officer to reopen assessment though wide, are not plenary and absolute and the words of statute are "reason to believe" and not "reason to suspect". But in this case only the AO has "reason to suspect" and not "reason to believe". We, therefore after taking into account the ratio laid down by the various decisions and facts of the case before us, are inclined to hold that reopening of assessment not initiated validly and is void ab-initio. Accordingly we quash the reopening of assessment.

(25) Since we decide the legal issue in favour of the assessee there is no need to adjudicate the other grounds raised by the assessee.

(26) Since we quash the reopening of assessment, the appeal of the Revenue in ITA.No. 1352/MUM/2016 is rendered infructuous and is accordingly dismissed.

(27) In the result, appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on the 10<sup>th</sup> October, 2018.

Sd/-  
**(MAHAVIR SINGH)**  
**JUDICIAL MEMBER**

Mumbai / Dated 10/10/2018  
Girdhar, Sr.PS

Sd/-  
**(RAJESH KUMAR)**  
**ACCOUNTANT MEMBER**

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER,

(Asstt.Registrar)  
**ITAT, Mum**