

**IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT- BENCH 'SURAT'**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.1504/Ahd/2017
निर्धारणवर्ष/Asstt. Year: 2007-08**

ITO, Ward-2(3)(8) Surat.	Vs.	Shri Shakti G. Karnawat H-4, New DTC, Hat Falia Haripura, Surat. PAN : ACFPK 2096 K.
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**ITA No.1381/Ahd/2017
निर्धारणवर्ष/Asstt. Year: 2007-08**

Shri Shakti G. Karnawat H-4, New DTC, Hat Falia Haripura, Surat. PAN : ACFPK 2096 K.	Vs.	ITO, Ward-2(3)(8) Surat.
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<i>(Applicant)</i>	(Respondent)
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Assessee by :	Shri Suresh Anchaliya, AR
Revenue by :	Smt.Smitha V. Nair, Sr.DR

मुनवाईकीतारीख/Date of Hearing : 16/11/2018
घोषणाकीतारीख/Date of Pronouncement: 10/12/2018

आदेश O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER: Present cross appeals are directed against order of the Id.CIT(A)-3, Surat dated 20.3.2017 passed for the Asstt.Year 2007-08.

2. Assessee in its appeal has pleaded that the Id.CIT(A) has erred in upholding reopening of the assessment by issuance of notice under section 148 of the Income tax Act, 1961.

3. As far as second fold of grievance is concerned, it is common with grievance raised by the Revenue in its appeal. The Id.AO has made addition of Rs.10,15,84,690/- on account of bogus purchase claimed by the assessee. On appeal, the Id.CIT(A) restricted profit element involved in its *modus operandi* at 12.50% of the alleged bogus purchases. Thus, Revenue is challenging deletion of addition by the Id.CIT(A) over and above 12.50% of the total addition, whereas the assessee in its second fold of grievance is challenging retention of addition by 12.5% of the alleged bogus purchases. The Id.counsel for the assessee, firstly impugned upholding of reopening of the assessment.

4. Brief facts of the case are that the assessee at the relevant time was engaged in the business of sale and purchase of diamond on commission basis. In other words, he was a commission agent by facilitating sale and purchase of diamonds on behalf of his principal. The assessee has filed return of income on 31.10.2007 declaring total income at Rs.2,43,180/-. The AO has observed that DGIT(Inv.), Mumbai has transmitted a report exhibiting that DGIT(Inv.), Mumbai has conducted search at the premises of Shri Bhanwarlal Jain and others on 3.10.2013. During the course of search, it revealed that Shri Bhanwarlal Jain and others were involved in the activity of providing accommodation entries and bills to enable others to account them as purchases, sales or loans etc. Thus, on the strength of that information, the Id.AO recorded reasons and sought to reopen the assessment. The Id.counsel for the assessee took us through the reasons reproduced in the letter filed by the assessee before the AO objections against re-opening. Copy of such letter is filed on page no.17 of the paper book which contained reasons. The Id.counsel

for the assessee took us through these reasons, which read as under:

"In this case, a letter is received from DIT (Inv.) - II, Mumbai through the CIT-III, Surat. As per Annexure - A enclosed the name of the beneficiary viz M/s Sanket Exports is intimated by the assessee has taken accommodation entries pertaining to bogus loans and advances. The assessee during the year under consideration has received unsecured loans aggregating to Rs.10,13,41,508/- from the following parties, -which are accommodation entries only and no real transaction has taken place.

<i>Sr.No.</i>	<i>Name of the concern</i>	<i>PAN no.</i>	<i>Amount</i>
<i>1</i>	<i>M/s. Daksh Diamonds</i>	<i>AURPS3696K</i>	<i>42934153/-</i>
<i>2</i>	<i>M/s Jewel Diam</i>	<i>ABUPV3494J</i>	<i>24929147/-</i>
<i>3</i>	<i>M/s Kothari & Co.</i>	<i>ABQPK7967H</i>	<i>33381111/-</i>
<i>4</i>	<i>M/s Little Diam</i>	<i>AABFL1469R</i>	<i>970971-</i>
<i>Total</i>			<i>101341508/-.</i>

A search and seizure operation u/s 132 of the Act was carried out in the case of Bhanwarlal Jain group, which is leading entry provider of Mumbai, The group is involved in providing accommodation entry of bogus unsecured loans and advances through benami concerns. The assessee M/s Sanket Exports is one of the beneficiary and had received accommodation entries pertaining to bogus unsecured loan from the above mentioned parties aggregating to Rs. 10,13,41,508/- which are entries only and no real transaction had taken place.

In view of the facts discussed above, it is observed that the assessee had received unsecured loans of Rs.10,13,41,508/- from above mentioned parties, the genuineness of which had not been proved by the assessee, the identity and creditworthiness had also not been proved by the assessee.

Hence, I have reason to believe that the unsecured loans of Rs. 10,13,41,508/- is bogus and mere accommodation and has been escaped assessment for A.Y.2007-08 by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary in the return of income. The assessee failed to disclose the material facts that the unsecured loans of Rs.10, 13,41,508/- are an accommodation entries and are not a genuine unsecured loans as reflected in the Balance Sheet. This is failure on the part of the assessee knowing that it is bogus transaction, which is incorporated in the balance sheet of the assessee. Hence, a notice u/s 148 r.w.s. 147 of the Income Tax Act, 1961 is to be issued for the A.Y.2007-08, to reopen the case"

5. By taking us through these reasons, the Id.counsel for the assessee submitted that assessment was reopened for the reasons that the assessee had availed unsecured loans of Rs.10,13,41,508/- from these four concerns. However, in the assessment order, the Id.AO has not made any addition under section 68 of the Act on account of unexplained loans. The AO in the assessment order treated it as purchases from these concerns which according to him were bogus. Thus, on the strength of judgment of Hon'ble Bombay High Court in the case of CIT Vs. Jet Airways (I) Ltd., 331 ITR 236, Hon'ble Delhi High Court's decision in the case of Ranbaxy Laboratories Ltd. Vs. CIT, 336 ITR 136 and the decision of Hon'ble Gujarat High Court reported in 355 ITR 172 in the case of CIT Vs. Mohmed Juned Dadani, he contended that if no addition was being made on the basis of an issue, for which assessment was reopened, no addition on other issue can be made. He further contended that there was no information available with the AO for reopening of the assessment because if he has information on account of availing unexplained/unsecured loans from these four concerns, then how he could treat this transaction as of bogus purchases. In other words, live-link between information alleged to be available with the AO vis-à-vis formation of belief that income has escaped assessment under a particular head is not available. He pointed out that under similar circumstances, reopening was quashed by the Hon'ble Gujarat High Court in the case of Varshaben Sanatbhai Patel Vs. ITO, 64 taxmann.com 179. He has placed on record copies of Hon'ble High Court decisions.

6. The Id.DR on the other hand relied upon the order of the Id.CIT(A) and contended that no doubt the AO has sought to reopen the assessment for assessing unexplained loans, but ultimately after reopening of the assessment, he came to know that these were bogus purchases and not of unsecured loans. The Id.AO has to form a *prima facie* opinion at the time reopening which can be changed subsequently.

7. We have duly considered rival contentions and gone through record carefully. A perusal of the reasons extracted (supra) would reveal that assessment was reopened on account of avilment of unsecured loans from these concerns. The expression "and also" employed in section 147 of the Act has been considered by the three Hon'ble High Courts including Hon'ble jurisdictional High Court propounding therein that if an addition is being not made on an item, for which assessment is being reopened, then any other items found during the course of re-assessment as escaped income cannot be added. According to the Hon'ble Gujarat High Court expression "and also" means that if addition is being made on account of escaped income for which assessment was reopened, then any other item found during the course of re-assessment of income could also be added. In the present case, the Id.AO has not made any addition under section 68 of the Act on account of unexplained/unsecured loans availed by the assessee. Therefore, no other item can be added. Apart from the above, we are of the view that the AO failed to establish the live-link between information available to him vis-à-vis formation of his belief, because he construed the information as of availing of bogus loans, which was not found to be true when he passed the assessment order; then what type of belief he has formed ? If an

addition has to be made on account of bogus purchase, then the assessment should have been reopened for that reasons. In the case of Varshaben Sanatbhai Patel (supra) the assessment was sought to be reopened on the basis of some information supplied by the DGIT (Invest). Hon'ble Court was of the view that formation of belief at the end of the AO was not based on the information supplied by the DGIT (Invest). In other words, there was no live-link between information vis-à-vis formation of belief. Discussion made in paragraph 15 of the above judgment is worth to note, which reads as under:

"15. Adverting to the facts of the present case, the returns filed by the assessee have been processed under section 147(1) of the Act. The Assessing Officer in the reasons recorded for the purpose of reopening the assessment has placed reliance upon the record of the case. As noted hereinabove, there is no assertion as regards on what basis the Assessing Officer has stated that the assessee had made claim in respect of bogus purchases in the trading and the Profit and Loss Account as expenditure. The Assessing Officer has stated that on verification of the details available on record, it has been noticed that the assessee has made bogus purchases; however, no specific averments are made as regards which details available on record reflected such bogus purchases. It is evident that the Assessing Officer for the purpose of reopening the assessment has placed reliance upon the material from an external source which does not form part of the record. However, the said aspect is not reflected in the reasons recorded. On behalf of the Assessing Officer, the learned counsel is not in a position to point out any material on the record on the basis of which the Assessing Officer could have formed such belief. What is now sought to be stated by way of the order rejecting the objections as well as the affidavit-in-reply filed in response to the averments made in the petitions is that the formation of belief is based upon the information which is received from the DGIT (Inv.), Mumbai. It is settled legal position as held by a catena of decisions that the substratum for formation of belief that income liable to tax has escaped assessment has to form part of the reasons recorded. In the present case, the substratum for formation of belief, as indicated in the order rejecting the objections as well as the affidavit-in-reply, is the information given by the DGIT (Inv.), Mumbai, which got no

relation with the reasons recorded, which are stated to be based upon the material available on record. Under the circumstances, the Assessing Officer, on the basis of the material on record, could not have formed belief that there was any escapement of income chargeable to tax so as to validly assume jurisdiction under section 147 of the Act. As held by the Supreme Court in a catena of decisions, the reasons recorded cannot be supplemented in the affidavit or by the order rejecting the objections. The material, on the basis of which, the belief that income chargeable to tax has escaped assessment has been formed, has to find place in the reasons itself.

16. In the aforesaid premises, the formation of belief that income has escaped assessment not being based upon record, it is evident that the substratum for reopening the assessment is not laid in the reasons recorded, but on material extraneous thereto. Under the circumstances, the basic requirement for assumption of jurisdiction under section 147 of the Act for reopening the assessment is not satisfied in the present case. The impugned notice under section 148 of the Act, therefore, cannot be sustained."

8. In present case also, according to the formation of belief, the assessee has availed unsecured loans from concerns of Shri Bhanwarlal Jain. However, while passing assessment order, it revealed to the AO that loans were not availed by the assessee. The assessee in its objection has been contended that he has no concern with Shri Bhanwarlal Jain. He is a commission agent who purchased and sold goods on behalf of principal on commission basis and account only commission in the profit & loss account. The AO has neither transmitted the information received by him to the assessee nor considered while disposing of the objection filed by the assessee. We have gone through the order of the AO dated 16.2.2016 vide which objection of the assessee has been adjudicated, but the AO has just made general discussion of the meaning and scope of section 147. He has not dealt with specific objection raised by the assessee *qua* re-opening. Similarly, before the Id.CIT(A), the assessee has raised specific objection about

formation of belief vis-à-vis information available to the AO. The Id.CIT(A) has also not dealt those objection of the assessee. The Id.CIT(A) observed that AO got information from the investigation wing, Mumbai indicating that the assessee was beneficiary of accommodation entry from entry operators. In our opinion, this is a general statement instead of considering exact nature of issue contested by the assessee. The assessee has contended that reopening was made on account of availing unsecured/unexplained loans, whereas the addition was made on account of bogus purchases. There is a vast difference in-between both these aspects. The Id.CIT(A) has not dealt with this aspect. Therefore, we are of the view that in view of judgment of Hon'ble Bombay High Court, Delhi High Court and Gujarat High Court explaining the meaning of expression "and also" employed in section 147 of the Act, reopening of the assessment in the present case is not sustainable. We allow this ground of appeal and quash the reassessment order. Consequently the appeal of the Revenue is dismissed and that of the assessee is allowed.

9. In the result, appeal of the Revenue is dismissed and that of the assessee is allowed.

Order pronounced in the Court on 10th December, 2018.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad; Dated 10/12/2018