

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

**BEFORE SHRI SANDEEP GOSAIN (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 2139/MUM/2015
Assessment Year: 2006-07**

&

**ITA No. 2140/MUM/2015
Assessment Year: 2007-08**

&

**ITA No. 2141/MUM/2015
Assessment Year: 2008-09**

Ms. Parisha C. Varia, 1401,
14th Floor, 241, Keshwala
Garden View, Laxmibai
Jagmohandas Marg, Malbar
Hill, Mumbai-400006.

PAN No. ABWPV8515C

Appellant

Vs. The Income Tax Officer-
16(2)(2), Room No. 214,
Tardeo Road, Matru
Mandir, Mumbai-
400007.

Respondent

Assessee by : Mr. Sanjay Parikh, AR

Revenue by : Mr. Abi Rama Kartikiyen, DR

Date of Hearing : 18/02/2019

Date of pronouncement: 25/02/2019

ORDER

PER N.K. PRADHAN, AM

The captioned appeals filed by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-30, Mumbai [in short 'CIT(A)'] and arise out of 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. We begin with the assessment year (AY) 2006-07.

2. The grounds of appeal filed by the assessee read as under:

1. The Ld. CIT(A) erred on the facts and in law in holding that the reopening of assessment by the Income Tax Officer 16(2)(2), Mumbai (AO) u/s 147 and assessing the income of the appellant at Rs.11,49,990/- vide order u/s 143(3) r.w.s. 147 is valid and as per law.
2. The reopening of assessment u/s 147 is without any basis and hence the consequential order u/s 143(3) r.w.s. 147 assessing the income of the appellant at Rs.11,49,990/- is bad in law.
3. The Ld. CIT(A) erred on facts and in law in holding that there was no violation of the principles of natural justice by the AO not giving the appellant an opportunity to cross examine Mr. Mukesh Choksi on whose statement the AO was relying on while making the addition.
4. The principles of natural justice were violated by the AO not giving the appellant an opportunity to cross examine Mr. Mukesh Choksi and hence the consequential order u/s 143(3) r.w.s. 147 is bad in law.
5. The Ld. CIT(A) erred on the facts and in law in upholding the order of the AO taxing short term capital gains of Rs.7,52,157/- as the alleged unaccounted income of the appellant and making an addition of Rs.9,87,301/- on that account.
6. The appellant had correctly offered the short term capital gains of Rs.7,52,157/- and the AO and CIT(A) were not justified in taxing the same as the alleged unaccounted income of the appellant and making an addition of Rs.9,87,301/- on that account.
7. Without prejudice to the above, the Ld. CIT(A) erred in not deciding the alternative grounds 15 and 16 to the effect that the entire sale consideration of Rs.9,87,301/- could not be assessed as the unaccounted

income and the appellant was entitled to deduction of the sum of Rs.2,34,135/- paid to M/s Alliance Intermediaries & Network Ltd. for purchase of shares.

8. The appellant prays that if your honours are not inclined to delete the entire addition of Rs.9,87,301/- on account of alleged unaccounted income, the amount paid to M/s Alliance Intermediaries & Network Pvt. Ltd. of Rs.2,34,135/- for purchase of share may be held to be not taxable in the hands of the appellant.
9. The Ld. CIT(A) erred on facts and in law in upholding the addition made by the AO on account of alleged payment of commission of Rs.19,746/-.
10. The appellant prays that the addition of Rs.19,746/- on account of alleged payment of commission as made by the AO and as confirmed by the CIT(A) may be deleted.

3. Briefly stated, the facts of the case are that the assessee filed her return of income for the assessment year (AY) 2006-07 on 14.07.2006 declaring total income of Rs.8,96,090/-. The case was reopened by the Assessing Officer (AO) by issuing notice u/s 148 dated 28.03.2013.

A search and seizure action u/s 132 of the Act was carried out in the case of M/s Mahasagar Securities Pvt. Ltd. (in short 'MSPL') by the Investigation Wing of the Department, Mumbai on 25.11.2009 and subsequent dates. During the course of search and seizure action, it was found that MSPL and its related group of 34 companies like M/s Alliance Intermediaries & Network Pvt. Ltd.; M/s Mihir Agencies Pvt. Ltd.; M/s Goldstar Finvest Pvt. Ltd. were engaged in fraudulent billing activities and were in the business of providing entries for speculation profit/loss, short term/long term capital gain/loss, share application money, commodities profit/loss on commodities trading (through MCX). In the

statement recorded during the course of search, Shri Mukesh Choksi who was managing these companies admitted of having provided accommodation entries to various persons. The AO observed that the assessee in the instant case was one of such beneficiaries, who obtained bogus entries towards purchase and sale of shares and securities. To be more specific, the AO found that the assessee had obtained accommodation entries from Alliance Intermediaries Pvt. Ltd. in respect of purchase and sale of scrip of Maruthi Infra during the FY 2005-06 relevant to the AY 2006-06. The purchase was of Rs.2,34,135/- and the sale Rs.9,87,301/-.

On the basis of the above reasons, the AO reopened the assessment as mentioned earlier. In response to a query raised by the AO during the course of assessment proceedings to explain as to why such transactions should not be treated as unexplained investment, the AR of the assessee filed a reply dated 09.10.2013, which has been extracted by the AO at page 2-3 of the assessment order and the same is as under:

“However since the admission/statement is being used against the assessee, we request you to give a copy of the said admission/statement in order to enable the assessee to repudiate & reply against the same comprehensively. After receiving the said statement/admission allowing as a reasonable time to study the same. We request you to give us an opportunity to cross examine the said Mr. Mukesh Choksi.”

And also asked for data and record received from the higher authority.

However, the AO relied on the statement recorded on oath u/s 131 dated 11.12.2009 of Shri Choksi. Also the AO called for information

u/s 133(6) with regard to the above transactions from National Stock Exchange of India Ltd. to verify its genuineness. In its reply dated 11.11.2013 the National Stock Exchange of India Ltd. stated that “from the records available with the Stock Exchange, Alliance Intermediaries & Network Pvt. Ltd. was a registered sub broker (INS 230932431) affiliated to M/s ISE Securities & Services Ltd. (TM Code: 10777), a registered trading member of the exchange. The registration of M/s Alliance Intermediaries & Network Pvt. Ltd. was cancelled on 19.02.2014”.

On the basis of the above findings, the AO held that there was no genuine business being carried out by these concerns and they were engaged in issuing bogus bills by providing LTCG/STCG/Speculative Profit/Loss/Exempted Income. Further, the transactions were not done through Stock Exchange but the bills shown by them appear to be genuine transactions done through Stock Exchanges. Therefore, the AO brought to tax the bill amount of sale during the year under consideration amounting to Rs.9,87,301/- as income from undisclosed sources. Also estimated the commission payable on such accommodation entries which is paid in cash @ 2% of Rs.9,87,301/- and made a disallowance of Rs.19,746/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the CIT(A). The CIT(A) dismissed the grounds taken by the assessee against reopening done by issuing notice u/s 148, by relying on the decision in *Rajesh Jhaveri Stock Brokers (P) Ltd.* 291 ITR 500 (SC).

Regarding the addition made by the AO, the Ld. CIT(A) agreed with the reasons given by the AO and further found that in the appellate proceedings for AY 2002-03 before the ITAT, Mumbai, M/s Goldstar Finvest Pvt. Ltd., one of the hawala companies of Shri Mukesh Choksi had admitted that it was an entry provider and the same was accepted by the Tribunal in ITA No. 4625/Mum/2005 and ITA No. 5000/Mum/2005 in its order dated 28.03.2008. On the basis of the above reasons the Ld. CIT(A) held that the assessee was engaged in bogus transactions to convert her undisclosed income into capital gains so as to avoid taxation. Also the addition of commission on the said accommodation entries procured were confirmed by the Ld. CIT(A) as it relates to same bogus transactions.

5. Before us, the Ld. counsel of the assessee files a Paper Book (*P/B*) containing (i) copy of acknowledgement and computation of total income, (ii) copy of capital account and balance sheet on 31st March, 2006, (iii) copy of notice u/s 148, (iv) copy of letter dated 8th April, 2013 in response to notice u/s 148, (v) copy of letter dated 12th June, 2013 filed with AO asking for reasons recorded for reopening of assessment, (vi) copy of letter dated 08.08.2013 received from AO along with reasons recorded for reopening the assessment, (vii) copy of letter dated 31st August 2013 objecting to the reasons recorded for reopening of assessment, (viii) copy of letter dated 5th September, 2013 received from AO disposing the objections raised for reopening the assessment, (ix) copy of letter dated 9th October, 2013 asking AO to furnish statement recorded along with an opportunity to cross examine Mr. Mukesh Choksi, (x) Copy of letter dated 21st October, 2013 filed with AO

along with relevant details, (xi) copy of letter dated 6th November, 2013 asking AO to furnish statement recorded on 16/01/2013 of Mr. Mukesh Choksi and also an opportunity to cross examine him, (xii) copy of letter dated 21st November, 2013 received from AO, (xiii) copy of statement of Mr. Mukesh Choksi dated 16th January, 2013, (xiv) copy of letter dated 14th December, 2013 written to AO to given opportunity to cross examine Mr. Mukesh Choksi, (xv) copy of letter dated 1st January, 2014 filed with AO along with annexures thereto, (xvi) copy of statement of Mr. Mukesh Choksi dated 25th November, 2009 recorded u/s 132(4) along with other enclosures, (xvii) copy of summons dated 16.01.2014 to cross examine Mr. Mukesh Choksi, (xviii) copy of letter dated 30th January, 2014 informing AO that Mr. Mukesh Choksi did not attend for cross examination, (xix) copy of submissions filed with the Commissioner of Income Tax (Appeal), (xx) copy of Supreme Court decision in the case of M/s Andaman Timber Industries, (xxi) copy of Bombay High Court decision in the case of CIT v. M/s Ashish International, (xxii) copy of Bombay High Court decision in the case of H.R. Mehta v. ACIT, (xxiii) copy of Mumbai Tribunal decision in the case of Shri Chandresh P. Varia and Shri Chandresh P. Varia HUF, (xxiv) copy of Mumbai Tribunal decision in the case of Kamla Devi S. Doshi and others, (xxv) copy of Ahmedabad Tribunal decision in the case of ACIT v. Vineet Sureshchandra Agarwal, (xxvi) copy of Mumbai Tribunal decision in the case of Sudhanshu Suresh Pandhare v. ITO and (xxvii) copy of Mumbai Tribunal decision in the case of Mr. Arvind Asmal Mehta v. ITO.

It is stated by the Ld. counsel that the details as mentioned at Sr. No. 1 to 18 were filed before the AO and the CIT(A).

6. On the other hand, the Ld. DR relies on the decision of the ITAT 'D' Bench, Mumbai in the case of *Disha N. Lalwani v. ITO* (ITA No. 6398/Mum/2012 for the AY 2003-04) and thus supports the order passed by the Ld. CIT(A).

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

Re: 1st & 2nd ground of appeal

In the instant case, the AO reopened the assessment which was processed u/s 143(1) of the Act. In the case of *Rajesh Jhaveri Stock Brokers P. Ltd.* (supra), the Hon'ble Supreme Court held that intimation u/s 143(1)(a) is not an assessment and held valid the notice issued u/s 148. In the case of *Kone Elevator India P. Ltd. v. ITO* 340 ITR 454 (Mad), *CIT v. Ideal Garden Complex P. Ltd.* 340 ITR 609 (Mad), it is held that in the 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 before the AO warranting reopening, is not relevant.

In view of the above factual scenario and position of law, the 1st & 2nd grounds of appeal are dismissed.

Re: 3rd, 4th, 5th, 6th, 7th, 8th, 9th & 10th grounds of appeal

The above grounds of appeal are considered together as they address a common issue.

In the case of *M/s Andaman Timber Industries* (supra), relied on by the Ld. counsel, in so far as the plea of the appellant that it was not

allowed to cross-examine the dealers whose statements were relied upon by the Adjudicating Authority in passing the orders, the Tribunal rejected its plea. In appeal, the Hon'ble Supreme Court held that not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It held that it was not for the Adjudicating Authority to pre-suppose as to what could be the subject matter of the cross-examination and make the remarks. Finally, it was held that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice. Therefore, the Hon'ble Supreme Court set aside the order of the Tribunal and allowed the appeal filed by the assessee.

In the case of *M/s Ashish International* (supra), the Hon'ble High Court held that :

“there were no sales/purchases but the transactions were only accommodation bills not involving any transactions. The Tribunal has recorded a finding of fact that the assessee had disputed the correctness of the above statement and admittedly the assessee was not given any opportunity to cross-examine the concerned Director of M/s Thakkar Agro industrial Chem Supplies P. Ltd. who had made the above statement. The appellate authority had sought remand report and even at that stage the genuineness of the statement has not been established by allowing cross-examination of the person whose statement was relied upon by the revenue.

In these circumstances, the decision of the Tribunal being based on the fact, no substantial question of law can be said to arise from the order of the Tribunal. The appeal is dismissed with no order as to costs”.

In the case of *H.R. Mehta* (supra), the Hon’ble High Court observed that quite apart from denial of an opportunity of cross-examination, the revenue did not even provide the material on the basis of which the department sought to conclude that the loan was bogus transaction. Further, it was held that “despite the request dated 15.02.1996 seeking an opportunity to cross-examine the deponent and furnish the assessee with the copies of statement and disclosed material, these were denied to him. In this view of the matter, we are inclined to allow the appeal on this very issue”.

7.1 At this moment, we refer to the following two decisions of the Hon’ble Supreme Court.

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.”

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. Lord Denning in *Kanda v. Government of Malaya* [1962] AC 322 has added :

“If the right to be heard is to be real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”

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.

As mentioned earlier, in its reply dated 11.11.2013 the National Stock Exchange of India Ltd. stated that “from the records available with the Stock Exchange, Alliance Intermediaries & Network Pvt. Ltd. was a registered sub broker (INS 230932431) affiliated to M/s ISE Securities & Services Ltd. (TM Code: 10777), a registered trading member of the exchange. The registration of M/s Alliance Intermediaries & Network Pvt. Ltd. was cancelled on 19.02.2014”.

In view of the decision in *M. Pirai Choodi* (supra), we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a *de novo* order after allowing the assessee to cross-examine Shri Mukesh Choksi and after giving reasonable opportunity of being heard to the assessee. We also direct the assessee to file the relevant documents/evidence before the AO. As the matter has been restored to the file of the AO, we are not adverting to the other case laws relied on by both the sides.

Facts being identical, the above decision for the AY 2006-07 applies *mutatis mutandis* to AYs 2007-08 & 2008-09.

8. In the result, the appeals are allowed for statistical purposes.

Order pronounced in the open Court on 25/02/2019.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

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

Mumbai;

Dated: 25/02/2019.

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,

(Sr. Private Secretary)
ITAT, Mumbai