

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

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

**ITA No. 4567/MUM/2017
Assessment Year: 2008-09**

M/s A.J.M. & Co. 801,
Panchratna Opera House,
Mumbai-400004

Dy. CIT-15(1)(1),
Aayakar Bhavan,
Churchgate, Mumbai.

PAN No. AAKFM0310R
Appellant

Respondent

Assessee by : Ms. Aarti Vissanji, AR
Revenue by : Mr. Manish Kumar Singh, DR

Date of Hearing : 08/03/2019
Date of pronouncement : 25/03/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2008-09. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-24 [in short 'CIT(A)'], Mumbai and arises out of the assessment completed u/s 143(3) r.w.s. 147 of the Income Tax Act 1961, (the 'Act').

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

1. Ld. CIT(A) erred in upholding reopening proceedings.
2. The Ld. CIT(A) erred in confirmed additions of Rs.33,46,408/- computed @ 12.5% on purchases of Rs.2,67,71,269/-. The addition of

Rs.33,46,408/- confirmed by the Ld. CIT(A) be deleted and assessed income be reduced accordingly.

3. Briefly stated, the facts are that the assessee filed its return of income for the assessment year (AY) 2008-09 declaring total income at Rs.81,48,858/-. The return was processed u/s 143(1) of the Act. Thereafter, the Assessing Officer (AO) reopened the case by issuing notice u/s 148 dated 25.02.2015, which was duly served on the assessee.

The AO reopened the assessment on the basis of information from the Director General of Income Tax (Inv.), Mumbai that the assessee had obtained accommodation entries amounting to Rs.2,15,13,166/- from five parties namely (i) Aadi Impex, (ii) Avi Exports, (iii) Moulimani Impex Pvt. Ltd., (iv) Sparsh Exports Pvt. Ltd. and (v) Sun Diam.

The AO further found that during the course of search proceedings on Shri Rajendra Jain Group, Shri Sanjay Chaudhary Group and Shri Dharmichand Jain Group, their respective statements were recorded, wherein they admitted that accommodation entries to the tune of Rs.2,67,71,269/- were provided to the beneficiary assessee to reduce its tax liability.

During the course of reassessment proceedings, in response to a query raised by the AO to file details of transaction made with the above parties during the year under consideration and other complete details, the assessee submitted details of transaction along with copies of invoices, purchase order, bank advice for having made payment against

these purchases, confirmation from the parties and documents related to sales effected against the purchases made from the above parties.

However, the AO was not convinced with the said explanation of the assessee and estimated the profit @ 12.5% of the alleged purchases of Rs.2,67,71,269/- by following the decision in *CIT v. Simit P. Sheth* 38 taxmann.com (Guj). Thus the AO made an addition of Rs.33,46,408/- as unexplained expenditure to the total income of Rs.81,48,858/- shown by the assessee.

4. In appeal, the Ld. CIT(A) upheld the reopening done by the AO by issuing notice u/s 148 on the ground that there was tangible material available with the AO at the time of reopening the assessment in the form of information received from Director General of Income Tax (Inv.), Mumbai. Also the Ld. CIT(A) held that as the assessment was reopened on the basis of evidence collected and statements recorded by the Sales Tax Department, the AO had reason to believe that income has escaped assessment and therefore, there is no change of opinion in the present case. With the above observations, the Ld. CIT(A) dismissed the ground of appeal filed by the assessee against reopening by issuing notice u/s 148 of the Act.

Also the Ld. CIT(A) following the same decision in the case of *Simit P. Sheth* (supra) as followed by the AO confirmed the estimation @ 12.5% of the alleged bogus purchases and thereby upheld the addition of Rs.33,46,408/- made by the AO.

5. Before us, the Ld. counsel of the assessee submits that without proper application of mind, the AO has issued notice u/s 148 in the present case reference is made to the following paragraph of the reasons recorded :

“As the assessee was found to be one of the beneficiaries who has availed accommodation entries of share application money and on the basis of the aforesaid material available with me now, it is seen that the assessee company has brought bogus share application money during FY 2007-08. Thus there is escapement of income of Rs.2,15,13,166/- for AY 2008-09 within the meaning of section 147 of the IT Act, 1961.”

The Ld. counsel submits that in the instant case there is no share application money and the reasons recorded by the AO which incorporates the above paragraph shows that there was no application of mind by the AO before issuing notice u/s 148 of the Act.

The Ld. counsel further submits that the information on the basis of which the AO made the addition has no evidentiary value because the concerned materials were not provided to the assessee. It is stated that the assessee had no transaction whatsoever with the said Rajendra Jain on whom search u/s 132 of the Act was conducted. It is stated that even the said Rajendra Jain Group and other groups on whom search action u/s 132 of the Act was conducted by the Director General of Income Tax (Inv.), the statements given by these parties are general in nature. The Ld. counsel argues that the AO has failed to point out whether any of the party who gave the statement before the Director General of Income Tax (Inv.), Mumbai named the assessee to whom they have provided any accommodation bills. Thus it is stated that the action of the AO is merely

based on the findings of the Director General of Income Tax (Inv.), Mumbai, without independent inquiry about the escapement of income by the assessee and without any corroborative evidence to arrive his own satisfaction of escaped income, which is bad in law. Thus the Ld. counsel submits that the addition of Rs.33,46,408/- made by the AO and then confirmed by the Ld. CIT(A) be deleted.

6. On the other hand, the Ld. DR 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 decisions are given below.

In respect of the grounds of appeal against the reopening of assessment u/s 148, it is found that the AO has reopened the assessment which was processed u/s 143(1) of the Act on the basis of information received from the Director General of Income Tax (Inv.), Mumbai that the assessee had taken bogus accommodation bills amounting to Rs.2,15,13,166/- from five parties namely (i) Aadi Impex, (ii) Avi Exports, (iii) Maulimani Impex Pvt. Ltd., (iv) Sparsh Exports Pvt. Ltd. and (v) Sun Diam. The wrong mention of accommodation entries of share application money in the reasons recorded by the AO may not invalidate the notice issued by him u/s 148 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. Their Lordships clarified the matter as under:

“17. The scope and effect of section 147 as substituted with effect from 1-4-1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.”

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 position of law, the Ld. CIT(A) has rightly confirmed the reopening done by the AO by issuing notice u/s 148 of the Act. Thus the 1st ground of appeal is dismissed.

7.1 However, we find that the AO without examining the details filed by the assessee has jumped into estimation @ 12.5% on the purchases of Rs.2,67,71,269/-. In the assessment order dated 22.03.2016 as mentioned earlier the AO asked the assessee to submit the details of transaction made with the above parties during the year under consideration and also to file complete details in this regard. In response to it, the assessee filed the following reply as mentioned at para 4.3 of the assessment order and we produce at below:

“4.3 In response, assessee has submitted letter in respect of details of transactions with the above parties along with copies of invoices, purchase order, bank advice for having payment made against these purchases, confirmation from purchase party etc. Assessee has also submitted documents related to sales effected against the purchases made from the above parties.”

At para 4.4 of the assessment order, the AO has mentioned that “the details submitted by the assessee have been carefully perused, however, not found to be acceptable.” Thereafter, the AO has narrated the statement of Rajendra Jain Group & Other Groups mentioned in the recorded reason and then relying on case laws made an estimated addition of Rs.33,46,408/-.

The law in respect of the above is well settled. We mention it here. After the assessee has adduced evidence to establish *prima facie* his

case, the onus shifts to the department as held in *Shankar Ind v CIT* 114 ITR 689; *Prakash Textile v. CIT* 121 ITR 890; *CIT v. United* 187 ITR 596; *Rajshree v. CIT* 256 ITR 331; *Ashokpal v. CIT* 220 ITR 452, 454; *CIT v. Metachem* 245 ITR 160; *CIT v. Shree Gopal* 204 ITR 285; *MOD Creations P. Ltd. v. ITO* 354 ITR 282.

We find that the AO incomplete disregard to the details filed by the assessee during the course of assessment proceedings mentioned by him at para 4.3 of the assessment order and without a finding that the party who gave the statement before the Director of Income Tax (Inv), Mumbai named the assessee to whom they have provided any accommodation bills, has made an estimated addition of Rs.33,46,408/-. Thus following the ratio laid down in the decisions mentioned hereinbefore, we direct the AO to delete the estimated addition of Rs. 33,46,408/-. Thus the 2nd ground of appeal is allowed.

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

Order pronounced in the open Court on 25/03/2019.

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

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

Mumbai;

Dated: 25/03/2019

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