

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai**

**Before Hon'ble Shri Sandeep Gosain, Judicial Member
And Hon'ble Shri N. K. Pradhan, Accountant Member**

**ITA No. 3751/Mum/2017
(Assessment Year: 2007-08)**

Shri Chetan Ramniklal Shah,
5th Floor, Urmi Building,
65, A.G. Road, Worli Sea Face,
Mumbai-4000025
PAN – AAJPS7227C

Asst. Commissioner of Income Tax
Central Circle-5(4)
Vs. 19th floor, R. No. 1927 Air India Bldg
Mumbai.

Appellant

Respondent

Appellant by: Shri Mani Jain, A.R
Respondent by: Shri Awangshi Gimson, D.R

Date of Hearing: 19.02.2019
Date of Pronouncement: 19.03.2019

आदेश / ORDER

Per Sandeep Gosain, Judicial Member:

The present Appeal filed by the assessee is against the order of Ld. CIT (Appeal) – 1, Mumbai dated 28.02.17 for AY 2007-08 on the grounds mentioned herein below:-

The Commissioner of Income Tax (Appeal) - 53 Mumbai has erred in:

1. Confirming the action of the Learned Assessing Officer of making an addition of Rs.11,06,80,000/- by treating the unsecured loans as

accommodation entries in lieu of cash, whereas as per the facts & circumstance it should not be done. Your appellant therefore prays that addition of Rs.11,06,80,000/- be deleted.

The appellant crave to add, amend, modify and delete any of the above grounds at the time or before the time of hearing.

2. At the very outset, Ld. AR appearing on behalf of the assessee drawn our attention to letter dated 31st Jan 2019 filed for seeking admission of additional ground, which are reproduced below:-

ADDITIONAL GROUNDS OF APPEAL

1. On the facts and circumstances of the Appellant's case and in Law, the notice issued by the Ld. AO u/s 148 of the ITA and the subsequent order passed u/s 143(3) r.w.s. 147 of the ITA is invalid as the reason which form the basis of re-opening in appellant's case and the addition made by the Ld. AO in the impugned order passed, are different.

2. On the facts and circumstances of the Appellant's case and in law the Ld A.O. erred in re-opening the assessment u/s 147 by issue of notice dated 25.03.2014 u/s 148, which is merely due to change in opinion and therefore reopening is bad in law.

3. On the facts and circumstances of the Appellant's case and in law the Ld A.O. erred in re-opening the assessment u/s 147 by issue of notice u/s 148 dated 25.03.2014, which is barred by limitation of law in view of the first proviso to the Sec 147 of the Income Tax Act, 1961.

4. The Appellant craves leaves to add, to amend, alter, modify and I or withdraw any or, all of the above grounds of appeal, each of which are without prejudice to one another.

Ld. AR submitted that the additional ground is purely question of law and no new facts are required to be brought on record. Therefore, applicant be allowed to raise additional grounds.

3. On the other hand Ld. DR submitted that the application dated 31.01.2019 is misconceived and is liable to be dismissed.

4. After having heard the counsels on this application, we are of the view that the additional ground raised by the assessee is purely legal in nature and all the necessary facts required for adjudication are already on the record and thus, no new evidence is required to be brought on record. Even otherwise, this ground goes to the roots of the case, therefore keeping in view the principle laid down by Hon'ble Supreme Court in the case of **NTPC Vrs CIT 229 ITR 383, Jute Corporation of India Vrs. CIT 187 ITR 688 (SC) and Ahmedabad Electricity Ltd. Vrs. CIT 199 ITR 351 (Bom) (FB)**, we allow the application dated 31.01.2019 and admit the additional grounds mentioned above for adjudicating on merits.

5. Since the additional grounds raised by the assessee challenges the very jurisdiction of the AO to reopen the assessment and this aspect goes to the roots of the case, therefore we have decided to dispose of the additional ground firstly.

Additional Ground No. 1 to 3.

6. Since these additional grounds raised by the assessee are inter connected and inter related and relates to challenging the proceedings initiated by AO in reopening the assessment u/s 147 of the Act by issuing notice 148 of the I.T. Act on different grounds, therefore we thought it fit to dispose of the same by this common order.

7. At the outset, Ld. AR appearing on behalf of the assessee submitted before us that these ground raised by the assessee are covered by the order of Hon'ble ITAT in *ITA No. 3750/Mum/17 in the case of wife of the assessee Smt Hema Chetan Shah Vrs. ACIT for AY 2007-08*, wherein the identical grounds raised in the present appeal have already been decided on merits. It was submitted that the notice issued by AO u/s 148 of the IT Act and the subsequent order passed u/s 143(3) r.w.s. 147 of the IT Act are invalid as the reason which form the basis of re-opening in assessee's case and the addition made by the AO

in the impugned order passed, are different. It was further argued that A.O. erred in re-opening the assessment u/s 147 of the Act by issue of notice dated 25.03.2014 u/s 148, which is merely due to change in opinion and therefore reopening is bad in law. It was further argued that the notice u/s 148 dated 25.03.2014, is barred by limitation of law in view of the first proviso to the Sec 147 of the Income Tax Act, 1961, therefore reopening of assessment u/s 147 of the I.T. Act is also invalid.

8. On the other hand, Ld. DR relied upon the orders passed by the revenue authorities.

9. We have heard counsels for both the parties and we have also perused the material placed on record as well as the orders passed by revenue authorities. We find that the *identical grounds* have already been decided by the Coordinate Bench of ITAT in assessee's wife case in *ITA No. 3750/Mum/17 in the case of Smt Hema Chetan Shah Vrs. ACIT for the same Assessment Year i.e. AY 2007-08*. The operative portion of the order of the Coordinate Bench of ITAT is reproduced below:-

7. *At the time of hearing, the ld. A.R advanced his arguments on the legal issue of the validity of reopening of assessment. The ld.*

A.R submitted that the assessing officer has reopened the assessment for the reason that the assessee has availed accommodation bills to the tune of Rs.45 lacs from M/s Sparsh. However, during the course of assessment proceedings, it came to light that the assessee has not availed any accommodation entries by way of purchase bills and the said fact was also accepted by the AO. Accordingly, the ld. A.R submitted that the very ground, on which the reopening was done was found to be non-existent. Hence the AO could not make any addition on the basis of reasons recorded by him for reopening. He submitted that if the AO has not made any addition on any of the reasons on which the reopening was done, then the A.O was not empowered to make addition of any other item during the course of assessment proceedings. In support of this proposition, the ld. A.R placed reliance on the decision rendered by Hon'ble Bombay High Court in the case of CIT Vs. Jet Airways (I) Ltd. (2011) 331 ITR 236. Accordingly he submitted that the reopening of assessment would fail on this ground alone.

8. *The ld. A.R further submitted that the assessing officer, at the time of reopening, was not clear as to which income has escaped the assessment in the hands of the assessee. In the reasons recorded for reopening, the assessing officer has stated that the assessee has obtained the accommodation entries for bogus purchases. However, in the assessment order, he has made addition on account of unsecured loans obtained by the assessee, that too voluntarily disclosed by the assessee. The Ld A.R submitted that the above said facts would show that the assessing officer has reopened the assessment in a mechanical manner on mere presumptions and also on vague reasons. He further submitted that the information claimed*

to have been obtained by the AO does not appear to be clear, meaning thereby, there was no tangible material available with the AO for coming to the conclusion that there was escapement of income. Accordingly, the ld. A.R submitted that the reopening of assessment is not in accordance with the law and is liable to be cancelled. In this regard he placed reliance on the decision rendered by Jaipur Bench of Tribunal in the case of M/s Damodar Oil Mills Company Ltd. Vs. ITO(ITA No. 515/JP/2016; dated 11.05.2018). The ld. A.R submitted that the Ahmedabad Bench of ITAT in the case of ITO Vs. Amit Shah (2016) 159 ITD 767, has held that even though the reasons recorded may not necessarily prove the escapement of income at the stage of recording the reasons, yet such reasons must point out to income escaping the assessment and it should not be a case of reopening for merely making any inquiry which may ultimately decide about escapement of income. The ld. A.R submitted that, in the instant case also, the assessing officer was not sure about escapement of income and he has reopened the assessment only to make inquires in order to find out whether there is escapement of income. Accordingly, he submitted that the reopening the assessment should be quashed.

9. *The ld. D.R on the contrary submitted that the assessee has not taken these legal grounds before the ld. CIT(A). He further submitted that the name of the concern “M/s Sparsh” mentioned in the reasons for reopening and “M/s Sparsh Export” mentioned in the assessment year refer to one same concern. He further submitted that the facts mentioned in the reasons for reopening i.e. Rs.45 lacs was the amount received by the assessee by way of accommodation entries also tallies with the unsecured loan taken by the assessee.*

Accordingly, the ld. D.R submitted that there is no much difference in the facts between the reasons for reopening and the assessment order. Accordingly, the ld. D.R submitted that the contentions of the assessee are liable to be rejected.

10. We heard rival contentions and perused the record. Before proceeding to address the legal issues contested by the assessee, we feel it relevant to extract below the reasons recorded by the assessing officer for reopening the assessment:-

Reasons for Reopening

Name of the assessee	SHRI HEMA CHETAN SHAH DECENT DIAMOND, 103, SHREEJI CHAMBERS TATA RD NO.2, MUMBAI-4
Status	INDL
PAN	AAJPS8892D
ASST. YEAR	2007-08

Reasons for re-opening of the assessment u/s. 147 of the Act.

In the above case, Return was processed u/s. 143(1) on 28.05.2009 on a total income of Rs. Nil.

2. A search and survey action was carried out by the DGIT (Investigation), Mumbai in the case of Shri Rajendra Jain Group, Shri Sanjay Chowdhary group and Shri Dharmi Chand group on 03-10-2013. The search action resulted in to collection of evidences and other findings which conclusively proved that the said assesses, through a web of benami concerns run and

*operated by them, is engaged in providing accommodation entries of **bogus sales and unsecured loans** to various beneficiaries*

3. *The records of the assessee for the year under consideration reveal that the assessee has adopted this modus operandi during the year under consideration.*

4. *Details of the parties who have issued **accommodation bills** to the assessee are as under:-*

<i>Name of Hawala Parties</i>	<i>F.Y.</i>	<i>Bill Amount</i>
<i>SPARSH</i>	<i>2006- 07</i>	<i>45,00,000/-</i>

1. *On the basis of the aforesaid information available with the undersigned, I have reason to believe that income chargeable to tax, as indicated above, to the tune of Rs. 45,00,000/- or any other income chargeable to tax which comes to my notice subsequently in the course of proceedings for re-assessment, has escaped assessment for A.Y. 2007-08 within the meaning of section 147 of the IT Act 1961. I am, therefore, satisfied that the assessee has failed to disclose true and complete particulars of its income for the year under consideration. Accordingly, the case is being proposed to be re-opened u/s. 147 of the Income Tax Act for A.Yr. 2007-08.*

2. *As per the Proviso to Sec. 151(2) of the Income tax Act 1961, permission of the Commissioner of Income tax -16, Mumbai is*

hereby sought to re-open the case of the assessee for A.Y. 2007-08 by issue of notice u/s. 148 of the Income tax Act 1961.

Put up for kind perusal and sanction please.

11. A careful perusal of the reasons recorded by the assessing officer would reveal that the assessing officer is referring to “accommodation bills”, which have been issued to the assessee. The paragraph 2 of the reasons for reopening states that the accommodation entries in the form of “bogus sales” and “unsecured loans” were given by the group to various beneficiaries. In paragraph 4 of the reasons for reopening, the AO is referring to “accommodation bills” only, meaning thereby, the AO was of the view that the assessee has availed bogus purchase bills from Rajendra Jain & other groups. However, during the course of assessment proceedings, it came to light that the assessee has availed only “unsecured loans” from the above said group and not “accommodation bills”. This fact was accepted by the AO during the course of assessment proceedings. Accordingly the AO has assessed the unsecured loans as income of the assessee u/s 68 of the Act.

12. The foregoing discussions would show that the reasons for reopening of assessment was that the assessee has availed “accommodation bills”, but the AO did not make any addition in the reopened assessment in respect of any accommodation bills. The Hon’ble Bombay High Court in the case of Jet Airways Ltd (supra) has considered an identical issue and it was held as under:-

“23. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in section 147 and on the basis of the precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that section 147 as it stands prostates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer may assess or reassess such income and also any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words and also , are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion to Explanation 3 to section 147. Parliament must be regarded as being aware of the interpretation that was placed on the words and also by the Rajasthan High Court in Shri Ram Singh [2008] 306 ITR 343. Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of section 147 as they stood after the amendment of April 1, 1989, continue to hold the field.”

13. *In case of Ranbaxy Laboratories Ltd. Vs. Commissioner of Income Tax reported in 336 ITR 136 wherein Delhi High Court had taken a similar view. It was observed as under:*

“18. We are in complete agreement with the reasoning of the Division Bench of the Bombay High Court in the case of CIT v. Jet Airways (I) Limited (2011) 331 ITR 236 (Bom). We may also note that the heading of section 147 is income escaping assessment and that of section 148 issue of notice where income escaped assessment . Sections 148 is supplementary and complimentary to section 147. Sub-section (2) of section 148 mandates reasons for issuance of notice by the Assessing Officer and sub-section (1) thereof mandates service of notice to the assessee before the Assessing Officer proceeds to assess, reassess or recompute the escaped income. Section 147 mandates recording of reasons to believe by the

Assessing Officer that the income chargeable to tax has escaped assessment. All these conditions are required to be fulfilled to assess or reassess the escaped income chargeable to tax. As per Explanation 3 if during the course of these proceedings the Assessing Officer comes to conclusion that some items have escaped assessment, then notwithstanding that those items were not included in the reasons to believe as recorded for initiation of the proceedings and the notice, he would be competent to make assessment of those items. However, the Legislature could not be presumed to have intended to give blanket powers to the Assessing Officer that on assuming jurisdiction under section 147 regarding assessment or reassessment of the escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction. For every new issue coming before the Assessing Officer during the course of proceedings of assessment or reassessment of escaped income, and which he intends to take into account, he would be required to issue a fresh notice under section 148.”

14. *Since the assessing officer did not make any addition in the reopened assessment on account of alleged availing of accommodation bills, being the reason for reopening, he could not have made any other addition as per the ratio laid down by Hon’ble Bombay High Court in the case of Jet Airways Ltd (supra). Accordingly the additions made by the AO towards unsecured loans are liable to be deleted.*

15. *We also notice that the reasons recorded by the AO for reopening of assessment are vague, i.e., the reasons show that the assessing officer was not clear in his mind about the escapement of income, when he reopened the assessment. Following observations made by the AO in the reasons for reopening makes this point clear:-*

(a) *The AO has mentioned about “accommodation bills” alleged to have been availed by the assessee.*

(b) *The AO states in paragraph 3 that “the records of the assessee for the year under consideration reveal that the assessee has adopted this modus operandi during the year under consideration”. In fact, the records of the assessee did not indicate any modus operandi, instead, the search and seizure operation in the cases of Rajendra Jain and other groups only revealed about the accommodation entries.*

(c) *In the reasons, the name of the company was mentioned as “Sparsh”, where as the name of the company from which the assessee had availed unsecured loan was “Sparsh Export P Ltd”. This fact shows that the assessing officer was also not clear about the name of the concern from which the assessee had availed accommodation entries.*

(d) *In paragraph 5, the AO states that the income chargeable to tax, as indicated above, to the tune of Rs.45,00,000/- or any other income chargeable to tax which comes to my notice subsequently in the course of assessment proceedings for re-assessment has escaped assessment for A.T 2007-08.” By the expression “as indicated above”, the AO is referring to accommodation bills. Further, he also states that “any other income.....”, meaning thereby, he was not sure as to the nature of income that has escaped assessment.*

(e) *The AO further states that he is satisfied that the assessee has failed to disclose true and complete particulars of its income for the year under consideration. In the instant case, the assessing officer has reopened the assessment after expiry of four years from the end*

of the assessment year. Hence the AO has observed so in order to comply with the requirement of the first proviso to sec.147 of the Act. When the AO is not clear about the nature of income that has escaped the assessment, then how the AO could charge the assessee that there was failure on the part of the assessee to disclose fully and truly all material facts.

16. All these points would show that the AO was not clear in his mind as to the income, which has escaped the assessment. When there is no application of mind by the AO, the reopening is liable to be cancelled. It was so held by the Jaipur bench of ITAT in the case of *M/s Damodar Oil Mills Company P Ltd vs. ITO* (ITA No.515/JP/2016 dated 11-05-2018). In this case also, the AO reopened the assessment on the reasoning that the said assessee has availed accommodation entries by way of bogus purchase bills. It was noticed that the assessee had actually received share application money. Accordingly it was held that the reopening of assessment is bad in law. For the sake of convenience, we extract below the operative portion of the order passed by the Jaipur bench of Tribunal:-

“7. We have heard both the sides on this issue. We have considered the case laws relied upon by both the sides. We have also gone through the reasons recorded by the Assessing Officer for issuing the notice U/s 148 of the Act on 25/3/2014. It is noticed that the Assessing Officer received information from DGIT(Inv), Mumbai. The details of the entry provider company and nature of entry and amount was provided.

However, while recording the reasons, the Assessing Officer has written that the assessee has obtained entries of bogus purchases. Further in finally recorded the satisfaction to issue the notice U/s 148 of the Act, the Assessing Officer has recorded the reasons, which are reproduced hereunder:

"The accommodation entries of bogus sales provided by the above companies constitute bogus purchases in the hands of the assessee. The assessee has suppressed its profits by taking accommodation entries of bogus purchases. Therefore, I have reasons to believe that minimum income of Rs.65,00,000/- has remained escaped to be taxed in terms of section 147 r.w.s. 148 of the I.T. Act for the assessment year under consideration."

Thus the Assessing Officer has categorically recorded in the reasons that the assessee has suppressed its profits by taking accommodation entries of bogus purchases. The intimation from DGIT (Inv), Mumbai was about the bogus investment/share applications. Thus, the Assessing Officer has not at all applied his mind while recording the reasons. The facts on record clearly establishes that the Assessing Officer has not applied his mind so as to come to a conclusion that he has reason to believe that the income has escaped assessment for the year under consideration. The reasons recorded are vague and are not based on any tangible material as well as on the facts acceptable in the eyes of law. The reasons recorded also suggest that the Assessing Officer has mechanically issued notice U/s 148 of the Act even not bothering regarding the nature of information received from the DGIT (Inv), New Delhi. Such vagueness in the reasons recorded make reopening bad in law and deserved to be quashed. Such view is also supported by the various decisions of the Hon'ble High Courts and the Tribunals as stated (supra). Therefore, we quash the reopening of the assessment."

17. *In the instant case also, there is no tangible material to show that the assessee has availed accommodation bills. Further, the AO is not clear in his mind as to what income has actually escaped income. The AO is referring to the record of the assessee and has observed that the assessee has adopted the modus operandi, where as the above said modus operandi came to light to the department only during the course of search operations conducted in the case of Rajendra Jain and other groups. Though the AO is stating that there was failure on the part of the assessee to fully and truly disclose all material facts, yet there is no material to support the*

same. All these facts would show that the AO has reopened the assessment in a mechanical manner, without application of mind. It will make the reopening bad in law as held by Hon'ble Delhi High Court in the case of CIT vs. Kamdhenu Steel & Alloys Ltd & Ors (2012)(68 DTR 38)(Del). Hence reopening of assessment, in the instant case, is liable to be quashed on this ground.

18. *In view of the foregoing discussions, we hold that the reopening of assessment is bad in law and further hold that the AO could not have made addition towards unsecured loans.*

19. *On merits, we notice that the assessee has furnished confirmation letters and financial statements of the two creditors in order to prove the loans taken by it. We notice that the assessing officer, without examining them and finding fault with them, has assessed the unsecured loans only on the basis of report from investigation wing of the department. Since the assessee has discharged the initial burden of proof placed upon her shoulders u/s 68 of the Act to prove the cash credits, the burden to disprove the claim of the assessee has shifted to the shoulders of the AO. However, the AO has failed to discharge the burden shifted to him. In that case, the addition made by the AO u/s 68 of the Act is liable to be deleted on merits also.*

20. *Since we have held that the reopening of assessment is bad in law, the orders of tax authorities are quashed accordingly.*

10. After having gone through the facts of the present case as well as considering the orders passed by revenue authorities and the order passed by the

Coordinate bench of ITAT as mentioned above in assessee's wife case, we find that the *identical grounds* have already been dealt with and decided by the ITAT in *ITA No. 3750/Mum/17 in the case of Smt Hema Chetan Shah Vrs. ACIT for AY 2007-08*. In the instant case also, there is no tangible material to show that the assessee has availed accommodation bills. Further, the AO was not clear in his mind as to what income has actually escaped assessment. The AO was referring to the record of the assessee and had observed that assessee has adopted the modus operandi, where as the above said modus operandi came to light to the department only during the course of search operations conducted in the case of Rajendra Jain and other groups. Though the AO was stating that there was failure on the part of the assessee to fully and truly disclose all material facts, yet there was no material to support the same. All these facts would show that the AO had reopened the assessment in a mechanical manner, without application of mind. It will make the reopening bad in law as held by Hon'ble Delhi High Court in the case of **CIT vs. Kamdhenu Steel & Alloys Ltd & Ors (2012)(68 DTR 38)(Del)**. Therefore, respectfully following the decision of the Coordinate Bench of ITAT and in order to maintain judicial consistency, we apply the same findings in the present case which are applicable mutatis mutandis in the present case. Hence, reopening of assessment, in the instant case, is liable to be quashed on these grounds.

11. In view of the foregoing discussions, we hold that the reopening of assessment is bad in law and further hold that the AO could not have made addition towards unsecured loans.

12. Even on merits, we notice that the assessee had furnished confirmation letters and financial statements of the creditors in order to prove the loans taken by it. We notice that the assessing officer, without examining them and finding fault with them, had assessed the unsecured loans only on the basis of report from investigation wing of the department. Since the assessee had discharged the initial burden of proof placed upon her shoulders u/s 68 of the Act to prove the cash credits, the burden to disprove the claim of the assessee had shifted to the shoulders of the AO. However, the AO failed to discharge the burden shifted to him. In that case, the addition made by the AO u/s 68 of the Act is liable to be deleted on merits also.

13. Since we have already held that the reopening of assessment is bad in law, therefore the orders of tax authorities stands quashed accordingly.

14. While arriving at the aforesaid decision, we are guided by the decision of Hon'ble Supreme Court in the case of ***Radhaswamy Satsang Vrs. CIT (1992) 193 ITR 321 (SC)*** that rule of consistency needs to be followed. Thus the above ground raised by the assessee stands allowed. We order accordingly.

15. In the net result, the appeal filed by the assessee stands **allowed** with no order as to cost.

Order pronounced in the open court on 19th March, 2019.

Sd/-

(N. K. Pradhan)
लेखासदस्य / Accountant Member
मुंबई Mumbai; दिनांक Dated : 19.03.2019
Sr.PS. Dhananjay

Sd/-

(Sandeep Gosain)
न्यायिकसदस्य / Judicial Member

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

.उप/सहायकपंजीकार
(Dy./Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai