

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "B", JAIPUR
श्री रमेश सी शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ ITA No. 1495 & 1496/JP/2018
निर्धारण वर्ष / Assessment Years : 2012-13 & 2013-14

Shri Rajendra Prasad Choudhary, 3781, Choudhary Bhawan, MSB Ka Rasta, Johari Bazar, Jaipur- 302003	बनाम Vs.	A.C.I.T., Circle-1, Jaipur.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AAPPK 5030 K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by: Shri Suchek Anchaliya &
Shri Mukesh Khandelwal (CAs)
राजस्व की ओर से / Revenue by : Shri Ashok Khanna (JCIT)

सुनवाई की तारीख / Date of Hearing : 16/05/2019
उदघोषणा की तारीख / Date of Pronouncement : 12/06/2019

आदेश / ORDER

PER: R.C. SHARMA, A.M.

These are the appeals filed by the assessee against the separate orders of Id.CIT(A)-I, Jaipur dated 09/11/2018 for the A.Ys. 2012-13 and 2013-14 in the matter of order passed U/s 143(3) read with Section 147 of the Income Tax Act, 1961 (in short, the Act).

02. The grounds taken by the assessee in both the years are common.
Grounds taken by the assessee in the A.Y. 2012-13 reads as under:

“1. That the Id. CIT(A) has erred in law and on facts in estimating GP of the appellant @ 8.5% resulting into an addition of Rs. 4,04,772/- as against an addition of Rs. 9,83,125/- made by the Id. A.O. on account of alleged unverifiable purchases of diamonds even after the facts that the appellant had declared sufficient GP and was comparable to average historical GP rate declared. Relief may please be allowed by deleting the addition so sustained by the Id. CIT(A).”

2.1 Following additional ground was raised by the assessee:

“1. On the facts and circumstances of the case and in law the Id. CIT(A) erred in not holding the assumption of jurisdiction by the Id. A.O. as bad in law as the conditions laid down under the Act for initiating reassessment proceedings u/s 147 of the Act were not fulfilled.

2. On the facts and circumstances of the case and in law, the Id. CIT(A) has erred in not holding that the Id. A.O. erred in not providing an opportunity to cross examination to the appellant while relying on a third party statement as the same was also in violation of principles of natural justice.”

03. Rival contentions have been heard and record perused. The facts in brief are that the case of the assessee was reopened on the basis of the information received from the office of the DGIT (Inv.). Mumbai that certain firms are engaged in the business of providing accommodation entries and out of such parties the appellant had also purchased goods from certain firms totaling to Rs. 1,81,71,990. Based on this information A.O. formed an opinion that income to the tune of Rs. 1,81,71,990 related to concealed income. In the assessment the Id. AO has

disallowed a sum of Rs. 45,42,998 being 25% of above referred sum and added the same to the income of the assessee.

04. By the impugned order, the Id. CIT(A) upheld the reopening of the assessment but given substantial relief by estimating profit rate at 8.5%, accordingly, against the addition of Rs. 45,42,998/-, the Id. CIT(A) has upheld addition of Rs. 15,41,042/-, against which the assessee is in further appeal before the ITAT.

05. At the outset, the Id AR challenged the reopening of assessment by contending that the reopening itself was not valid in so far as merely on the basis of information the A.O. has reopened the assessment and has not made any enquiry to reach to the satisfaction that there was a reason to believe that the income has escaped assessment. Our attention was also invited to the reasons recorded for reopening according to which the A.O. has reopened the assessment on the basis of information from DGIT(Inv.), Mumbai. As per the reasons so recorded by the A.O., there was no satisfaction of the A.O. with regard to any income having been escaped assessment and merely on the basis of information, he has reopened the assessment. The Id AR has further contended that the A.O. has neither supplied copy of information so received on the basis of which addition has been made nor any opportunity to cross examination was

provided in spite of the fact that both before the A.O. and the Id. CIT(A) the assessee has requested for supply of statement on the basis of which addition was made and also for cross examination of the persons on whose statement, the addition has been made. The Id AR has also invited our attention to the order passed by the A.O. wherein he has clearly declined for cross examination in spite of the fact that the assessee has specifically asked for the same. Our attention was also invited to the submission made before the Id. CIT(A) for providing opportunity to cross examine, wherein reliance was placed on the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs CCE order dated 02/09/2015 and also the order of the Coordinate Bench of ITAT Jaipur in the case of Pramod Jain order dated 31/1/2018 wherein it was held that the requirement of producing such parties for cross examination is a right of the assessee which must be carefully fulfilled by the A.O.

06. With regard to merit of addition, it was contended by the Id AR that the assessee had maintained proper stock and had all valid proofs to justify the purchases to be genuine. The Id. AO has not made any efforts independently in this regard. She had merely relied on the information received from investigation wing, Mumbai and reached on the conclusion of purchases being bogus. Our attention was also invited to the profit rate chart for earlier and subsequent assessment years so as to indicate that

the profit rate declared by the assessee is comparative in all the years under consideration as under:

Asstt. Year	Turnover	Gross Profit	Profit Rate
2010-11	3,70,62,443	22,54,341	6.08%
2011-12	5,42,80,906	37,27,037	6.87%
2012-13	5,78,61,983	45,13,471	7.80%
2013-14	7,06,86,095	51,74,137	7.32%
2014-15	7,89,42,771	56,70,745	7.18%
2015-16	8,53,52,037	60,66,474	7.11%
2016-17	9,51,40,396	77,63,974	8.17%
2017-18	8,62,19,742	64,83,576	7.53%
Average	56,55,46,073/-	4,16,53,655/-	7.36%

Our attention was also invited to the profit of 8.91% shown in respect of transaction entered with these parties which indicated that the profit shown in respect of these purchases was better than the normal profit rate of 7.32% shown during the year under consideration. Accordingly, it was pleaded that when the profit rate in respect of such purchases is more than the normal profit rate shown by the assessee and accepted by the department, no further addition is required.

07. On the other hand, the Id DR has argued that the reopening was based on valid information of the Investigation Wing to the effect that the assessee has purchased goods from the Hawala dealers, accordingly, reduced its profit. He further contended that the Id. CIT(A) has already given substantial relief by reducing the profit on such bogus purchases @ 8.5% which should be upheld.

08. We have considered the rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the Id. AR and Id. DR during the course of hearing before us with regard to the validity of reopening as well as merit of the additions so made and upheld by the Id. CIT(A). From the record, we found that the A.O. has reopened the case merely on the basis of information without conducting any independent enquiry. Thus, the reopening was not based on own satisfaction of the A.O. but on the borrowed satisfaction which can be clearly seen from the following paragraph in his reasons for reopening:

“On the basis of the information available on record, I have reasons to believe that income of Rs. 39,32,500/- chargeable to tax has escaped assessment as per clause (b) of explanation 2 of section 147 of the IT Act, 1961. Therefore, it is a fit case to issue notice u/s 148 of the I.T. Act, 1961.”

09. In the reasons recorded for reopening, the A.O. stated that reopening was done on the basis of information received from DGIT (Inv.), Mumbai and on the basis of such information, he found his reason to believe that the income had escaped assessment. In the reassessment order passed U/s 143(3) r.w.s. 147 of the Act, the A.O. at various instances depicted his reliance on the borrowed information received from DGIT (Inv.), Mumbai rather than his own enquiry and satisfaction. It is

precondition of Section 147 that the A.O. should form his own satisfaction based on credible enquiry and on the credentials of the facts of the case. He shall not act on the basis of borrowed satisfaction. However, in the present case, the A.O. has solely relied on the information forwarded by the Investigation Wing, Mumbai. For this purpose, reliance is placed on the following judgments which were decided on identical facts:

Shilpi Jewellers Pvt. Ltd. vs. Union of India & Ors. WRIT PETITION No. 3540 of 2018 (Bombay High Court)

"9. In the objections, the assessee had also questioned the quantification of the escaped income of Rs. 33.34 crore. In reply to the petition, the Assessing Officer stated that the same emerges from the information received by him from the investigation wing. This clearly reflects non application of mind on the part of the Assessing Officer recording the reasons."

The Pr. Commissioner of Income Tax 5 vs. 111/s. Shodiman Investments Pvt. Ltd ITA No. 1297 of 2015 (Bombay High Court)

"14. Further, the reasons clearly shows that the Assessing Officer has not applied his mind to the information received by him from the DDIT (Inv.). The Assessing Officer has merely issued a reopening Notice on the basis of intimation regarding reopening notice from the DDIT (Inv) This. is clearly in breach of the settled position in law that reopening notice has to be issued by the Assessing Office on his own satisfaction and not on borrowed satisfaction."

Ostwal Diamond Pvt. Ltd. vs. ITO, Ward 2(5) ITA No.3653/Mum/2017 & 2270/Mum/2018 (Mumbai ITAT)

"13. We have considered rival contentions and carefully gone through the orders of the authorities below. Under the provisions of Section 147, reopening solely on the basis of information received from the Investigation wing and without independent application of mind is void."

10. From the record we found that during the course of reassessment proceedings, the assessee had specifically requested the A.O. for copies of statement on which the A.O. was relying and an opportunity to cross examine the relevant parties. However, the A.O. ignored the same and no opportunity was provided to the assessee. In reply to the assessee's request, the A.O. in his order has rejected the same by specifically writing that the assessee's right to cross examination of parties is not a part of reasonable opportunity of being heard. As per our considered view, seeking opportunity for cross examination of the party on whose statement the A.O. is relying upon is a right of the assessee in view of the principles of natural justice. The Hon'ble Supreme Court in case of M/s Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II CIVIL APPEAL NO. 4228 OF 2006 (Supreme Court) held as under:

"According to us, 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 inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected."

11. We also found that even same request was made before the Id. CIT(A) but the same was not considered and plea of the assessee was rejected. It was also submitted by the assessee before the Id. CIT(A) that the decision relied upon by the A.O. of the Hon'ble Rajasthan High Court in the case of Rameshwar Lal Mali 256 ITR 536 was passed in the year 2002 and the Kolkata High Court in the case of Mahendra N Chatterjee (1977) Tax LR 1754 in the year 1977, however, the Hon'ble Supreme Court's decision in the case of Andaman Timber Industries (Supra) was passed in the year 2006. Therefore, the judgment of the Hon'ble Supreme Court is hold precedent and the assessee's right to seek an opportunity for cross examination is justified and the rejection of the same resulted into nullity of the assessment itself in view of the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries (Supra).

12. Even on merits also, the assessee had a good case in so far as the profit declared in respect of purchases from these alleged parties were

more than the profit declared in respect of other parties and the average profit declared during the year under consideration. We also found that the assessee had consistently shown profit between 6 to 8% in the A.Y. 2013-14 and 7.80% in the A.Y. 2012-13, thus overall profit rate was 7.8%. The A.O. has made addition of 25% on alleged bogus purchases without any basis, by the impugned order, the Id. CIT(A) restricted the addition on the basis of past profit to 9.5% of alleged bogus purchases in A.Y. 2013-14 and 8.5% in the A.Y. 2012-13. We also found that over all profit declared by the assessee being 7.32% and 7.80% is substantially higher in both the years keeping in view the nature of business and industry standard. Therefore, this is not a case where it may be presumed that the assessee has made alleged bogus purchases in order to reduce its profit margin.

12. In the result, appeal of the assessee is allowed.

13. The facts and circumstances in the appeal for the A.Y. 2013-14 are *pari materia*, following the above reasoning passed in the appeal for the A.Y. 2012-13, the appeal of the assessee for the A.Y. 2013-14 is also allowed.

14. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 12th June, 2019.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Sd/-
(रमेश सी शर्मा)
(RAMESH C SHARMA)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 12th June, 2019

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Rajendra Prasad Choudhary, Jaipur.
2. प्रत्यर्थी / The Respondent- The A.C.I.T., Circle-1, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 1495 & 1496/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar