

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI**

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER

ITA NO. 4295/MUM/2018 (A.Y: 2010-11)

Shri Girish Devichandra Doshi Flat No. 8, K.Y.S. Niwas 7, Mughbhat Lane Khandilkar Road, Mumbai – 400 004 PAN: AACPD 4508 Q	v.	Income Tax Officer - 19(1)(3) Room No. 220, 2 nd Floor Matru Mandir, Tardeo Road, Mumbai – 400 007
(Appellant)		(Respondent)

Assessee by : **None**
Department by : **Shri Chaitanya Anjaria**

Date of Hearing : **12.06.2019**
Date of Pronouncement : **12.06.2019**

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals)-4, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 04.05.2018 for the A.Y. 2010-11.
2. The assessee in the grounds of appeal challenged the order of the Ld.CIT(A) in sustaining the reopening of assessment made u/s. 147 of the Act. Assessee also contested the addition made by the Assessing Officer

towards unexplained investment in respect of bogus purchases estimating the profit element from such purchases at 12.5%.

3. Briefly stated the facts are that, the assessee engaged in the business of wholesale trading of copper wires and insulating materials filed return of income on 24.09.2010 declaring income of ₹.3,23,030/-. Return was processed u/s. 143(1) of the Act and subsequently reopened u/s. 147 of the Act by issue of notice dated 05.11.2014 u/s. 148 of the Act, based on the information received from the DGIT (Inv) Mumbai, stating that assessee has availed accommodation entries from various dealers without purchase of any materials from them. The assessment was reopened by the Assessing Officer, in the course of re-assessment proceedings assessee was required to prove the genuineness of the purchases made from three parties as mentioned in the Assessment Order. Assessing Officer also issued notices u/s. 133(6) of the Act to the said parties which were returned unserved. The assessee produced copies of ledger accounts along with copies of purchase invoices, copies of bank accounts evidencing payments made through banking channels, party wise details of purchases and corresponding sales and submitted that the purchases made are genuine and they cannot be treated as bogus. Not convinced with the submissions of the assessee the Assessing Officer treated the purchases as non-genuine and he was of

the opinion that assessee had obtained only accommodation entries without there being any transportation of materials and the assessee might have made purchases in the gray market. However, Assessing Officer following the decision of the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Seth [356 ITR 451] estimated the profit element at 12.5% from such purchases treated as non-genuine and added to the income of the assessee. The Ld.CIT(A) sustained the addition and he rejected the contentions of the assessee that the reopening of assessment is bad in law.

4. In spite of issue of notice none appeared on behalf of the assessee nor any adjournment was sought by the assessee. Therefore, I proceed to dispose off this appeal on hearing the Ld. DR on merits.

5. Ld. DR vehemently supported the orders of the authorities below.

6. Heard Ld. DR, perused the orders of the authorities below. In respect of the reopening of assessment, I am of the view that the assessment was reopened based on the information received from the DGIT(Inv.) and therefore, I am of the view that there is tangible material came on record after passing intimation u/s.143(1) of the Act. In the case of CIT v. Rajesh Jhaveri Stock Brokers (P) Ltd. [291 ITR 500], the Hon'ble Supreme Court held that intimation u/s 143(1)(a) is not an assessment

and upheld the validity of the notice issued u/s 148 and the reopening of assessment. 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 Assessing Officer by issuing notice u/s 148 of the Act. Thus the 1st ground of appeal is dismissed.

7. On merits the Hon'ble Bombay High Court in the case of PCIT v. M/s. Mohommad Haji Adam and Company in ITA.No.1004 of 2016 dated 11.02.2019 reported in 2019-TIOL-High Court–Mum-IT held as under: -

"8. In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of N.K. Industries Ltd. (supra) cannot be applied without reference to the facts. In fact in paragraph 8 of the same Judgment the Court held and observed as under-

"So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6 % gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66 %. Therefore, considering 5.66 % of Rs.3,70,78,125/- which comes to Rs.20,98,621.88 we think it fit to direct the revenue to add Rs.20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue."

9. In these circumstances, no question of law, therefore, arises. All Income Tax Appeals are dismissed, accordingly. No order as to costs."

8. As could be seen from the above judgement the Tribunal restricted the Gross Profit rate on non-genuine purchases to the same rate at which the assessee has shown in respect of genuine purchases in the Books of Accounts. This was confirmed by the Hon'ble Bombay High Court for the reason that there is no discrepancy between the purchases shown by the assessee and sales declared and also for the reason that purchases

cannot be rejected without disturbing the sales in the case of a trader. Thus, respectfully following the said decision, I direct the Assessing Officer to estimate the Gross Profit in respect of non-genuine purchases at the same Gross Profit rate at which assessee has shown on the genuine purchases and compute the disallowance. Thus, I restore this issue to the file of the Assessing Officer to ascertain the Gross Profit rate shown by the assessee in respect of genuine purchases and to apply the same rate for the non-genuine purchases. I make it clear that if the Gross Profit rate shown by the assessee on non-genuine purchases exceeds 12.5% the addition/disallowance be restricted to 12.5% only as was already done by the Assessing Officer in the Assessment Order.

9. In the result, appeal of the assessee is partly allowed for statistical purposes.

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

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER
Mumbai / Dated 12/06/2019
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum