

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “C” BENCH

**(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI WASEEM AHMED, ACCOUNTANT MEMBER)**

**ITA. No: 301/AHD/2018
(Assessment Year: 2005-06)**

Marudhar Polycot (India) Pvt. Ltd. 406, Dwarkesh Complex, 4th Floor, Opp. Patel Vas, Mithakhali Gam, Mithakhali Ahmedabad-380006 (Appellant)	V/S	DCIT, Circle-2(1)(2), Ahmedabad (Respondent)
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PAN: AADCM8266G

**Appellant by : Shri P. F. Jain, AR
Respondent by : Shri Lalit P. Jain, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 10 -06-2019
Date of Pronouncement : 26 -06-2019

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. This appeal filed by the Assessee is directed against the order of the Ld. CIT(A)-2, Ahmedabad dated 19.01.2018 pertaining to A.Y. 2011-12 and following grounds have been taken:

1. *The Id. C.IT.(Appeals) has erred in law and on facts in upholding the order passed u/s. 143(3) r.w.s. 147 submitted to be bad-in-law and on fact inasmuch as requisite conditions for re-opening were not satisfied.*
2. *The Id.C.IT.(Appeals) has erred in law and on facts in not quashing and holding the reassessment order as invalid inasmuch as the reassessment order passed was without assuming proper jurisdiction and being based on change of opinion and borrowed satisfaction.*
3. *He has erred in law and on facts in not appreciating properly the objections to reassessment proceedings made before A.O. by submission dated 21/10/2016 along with relevant evidence including affidavit of Praveenkumar Jain retracting the confession alleged to have been made by him whereby the order got legally vitiated.*
4. *He has erred in law and on facts in upholding addition of Rs.2.90 crore being capital investment made by six companies mentioned in Para 5 of assessment order u/s. 68 treating the same as bogus share application money and accommodation entries without properly considering and appreciating the submission dated 07/11/2016 before A.O. along with relevant evidences proving the investment made by the said companies.*
5. *On the facts addition u/s.68 of Rs.2.90 crore being factually and legally erroneous deserves to be deleted.*
6. *He has erred in law and facts in upholding the addition without appreciating the fact that the onus u/s.68 for proving investment having been discharged by the assessee no addition u/s.68 ought have been made.*
7. *On the facts of the assessee, no interest u/s.244A & u/s.234B ought have been levied.*
8. *The appellant craves leave to add, alter and or modify any ground of appeal.*

2. The facts of the case are as emanates from the Assessment order:

In this case, return of income for assessment year 2011-12 was filed on 28/09/2011 declaring income of Rs.58,48,228/-. The return was processed u/s.143(1) of the Income-tax Act on 31/03/2012. The assessment of the assessee was completed u/s. 143(3) on 07/02/2014 determining total income at Rs.62,47,250/-. Thereafter, it was learnt from the Investigation Wing of Mumbai that a search u/s. 132 was conducted in the cases of Praveen Kumar Jain Group were providing accommodation entries and that the assessee had

obtained accommodation entries to the tune of Rs.2,90,00,000/-from the bogus concern.

3. On the other hand assessee's contention that the assessee has stated that neither statement of Shri P.K. Jain was supplied nor any chance to cross examination was granted by the A.O. But ld. A.R. was not agreed with the contention of the assessee and made addition of Rs. 2.90 crore.
4. Against the said order, assessee preferred first statutory appeal before the ld. CIT(A) and before him, assessee took the plea that statement of Shri P.K. Jain has not been supplied to him despite of the fact that he made the request to the ld. A.O but to no avail and ld. CIT(A) confirmed the action of the A.O.
5. We have gone through the relevant record and impugned order. The lower authorities have made addition on the basis of investigation carried out in the case of Shri Praveen Kumar Jain where Shri P.K. Jain has admitted that he was indulged in providing entries to various companies and assessee has received accommodation entry in the form of share application money/share premium from various paper companies controlled and managed by Shri P.K. Jain. The assessee has specifically requested for the statement of Shri P.K. Jain to the A.O. but ld. A.O. did not supply the same.
6. In support of its contention, assessee cited a judgment of Delhi High Court in the matter of Principal CIT vs. Meenakshi Overseas Pvt. Ltd. wherein appeal of the revenue was dismissed by the Hon'ble Delhi High Court on the following observation:

Reassessment—Income escaping assessment—Validity of Proceeding—AO passed assessment order against assessee—AO u/s. 148 issued notice

to assessee for reassessment holding that AO had reason to belief that income had escaped assessment—AO initiated reassessment proceedings u/s. 147/148—CIT(A) upheld order of AO—Tribunal held that requisite sanction had not been obtained by AO from Competent Authority under Section 151 and, therefore, invalidated re-opening , of assessment under Section 147/148— Revenue's appeal against said order of ITAT was allowed by Court—ITAT held that AO had not applied his mind at time of initiating proceedings of reassessment under Section 147—Tribunal quashed assessment proceedings under Section 147/148—Held, as rightly pointed out by ITAT, 'reasons to believe' were not in fact reasons but only conclusions, one after other—Expression 'accommodation entry' was used to describe information set out without explaining basis for arriving at such conclusion—Statement that said entry was given to Assessee on his paying "unaccounted cash" was another conclusion basis for which was not disclosed—Thus, crucial link between information made available to AO and formation of belief was absent—Court was not inclined to interfere in above circumstances in exercise of its writ jurisdiction to quash proceedings—Careful perusal of reasons revealed that AO did not merely reproduce information but takes effort of revealing what was contained in investigation report specific to Assessee—AO made no effort to set out portion of investigation report which contained information specific to Assessee, he did not also examine return already filed to ascertain if entry had been disclosed therein—AO was not merely reproducing information received from investigation but took effort of referring to deposition made during survey by Chartered Accountant that Assessee company was involved in giving and taking of bogus entries—AO thus indicated what tangible material was which enabled him to form reasons to believe that income had escaped assessment—It was in those circumstances that in case, Court came to conclusion that there was prima facie material for AO to come to conclusion that Assessee had not-made full and true disclosure of all material facts relevant for assessment—Reasons to believe contained not reasons but conclusions of AO one after other—There was no independent application of mind by AO to tangible material which formed basis of reasons to believe that income has escaped assessment—Reasons failed to demonstrate link between tangible material and formation of reason to believe that income had escaped assessment—Revenue's appeal dismissed.

7. Ld. A.R. also cited a judgment of Jurisdictional High Court in the matter of Varshaben Sanatbhai Patel vs. ITO wherein similar circumstances, plea of the assessee was accepted.

Section 147 of the Income-tax Act, 1961 - Income escaping assessment - Non-disclosure of primary facts (Information from external source) - Assessment years 2009-10 to 2011-12 - For relevant assessment years, assessee filed its returns declaring certain taxable income -Returns were processed under section 143(1) - Subsequently, on basis of information received from DGIT (Inv.) that assessee made bogus purchases and to said extent income had escaped assessment from tax, Assessing Officer issued notice under section 148 seeking to reopen, assessment - Assessee's objections to reopening of assessment were set aside - Whether., since formation of belief of Assessing Officer was not based upon details available on record, rather on basis of information supplied by DGIT (Inv.) i.e. an external source, it could not be concluded that requirements of section 147 were satisfied - Held, yes - Whether, therefore, impugned reassessment proceedings deserved to be set aside - Held, yes [Para 13] [In favour of assessee]

8. Ld. A.R. also cited an order of Co-ordinate Bench in the matter of Shantaben Parasmal Jain in ITA No. 726/Ahd/2017 wherein similar circumstances, relief was granted by the ITAT with following observation:

14. The entire assessment is based upon the statement of Shri Mukesh Choksi. It is an undisputed fact that neither a copy of the statement was supplied to the assessee. nor any opportunity of cross-examination was given by the Assessing Officer/CIT(A). The Hon'ble Supreme Court in the case of Andaman Timber Industries in Civil Appeal No. 4228 of 2006 was seized with the following action of the Tribunal:-

"6. The plea of no cross examination granted to the various dealers would not help the appellant case since the examination of the dealers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex factory prices remain static. Since we are not upholding and applying the ex factory prices, as we find them contravened and not normal price as envisaged under section 4(1), we find no reason to disturb the Commissioners orders."

15. The Hon'ble Apex 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. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted ITA No.726/Ahd/2017 Shantaben Parasmal Jain vs. DCIT 2010-11 to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority, As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose

as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

In view of the above, we are of the opinion 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, thus, set aside the impugned order as passed in the Tribunal and allow this appeal."

9. Since statement of Shri P.K. Jain was not supplied to the assessee on the basis of addition was made and in the absence of said statement assessee could not cross examine to Shri P.K. Jain and same is amount to miscarriage of justice despite of the fact that assessee made a formal request to the lower authorities. In our considered opinion and after considering the aforesaid judgment, no addition can be made on the basis of which violate principle of natural justice.
10. Since we are inclined to grant relief to the assessee on technical ground, therefore, we do not adjudicate this appeal on factual material.
11. In the result, appeal filed by the Assessee is allowed.

Order pronounced in Open Court on	26- 06- 2019
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Sd/-

Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER True Copy
Ahmedabad: Dated 26/06/2019

(MAHAVIR PRASAD)
JUDICIAL MEMBER