

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

BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
&

SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No.2283/Mum/2016

(Assessment Year :2007-08)

Diasqua India Pvt.Ltd. CW-6061,6062,6063,6071 Bharath Diamond Bourse BKC, Bandra(E) Mumbai-400 051	Vs.	DCIT-5(1)(2) Room No.568, 5 th Floor Aaykar Bhawan M.K.Road Mumbai-400 020
PAN/GIR No.AACCD3418N		
Appellant)	..	Respondent)

&

ITA No.3234/Mum/2016

(Assessment Year :2007-08)

DCIT-5(1)(2) Room No.568, 5 th Floor Aaykar Bhawan M.K.Road Mumbai-400 020	Vs.	Diasqua India Pvt.Ltd. CW-6061,6062,6063,6071 Bharath Diamond Bourse BKC, Bandra(E) Mumbai-400 051
		PAN/GIR No. AACCD3418N
Appellant)	..	Respondent)

Assessee by	Suchek Achalia, AR
Revenue by	Somnath Wajale, DR
Date of Hearing	16/07/2019
Date of Pronouncement	31/07/2019

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

These cross appeals filed by the assessee, as well as the revenue are directed against order of the Commissioner of Income Tax Appeals-10, Mumbai, dated 28/01/2016 for the Assessment Years 2007-08. Since, the facts are identical and the issues are

common, for the sake of convenience, these appeals were heard together and are disposed-off by this consolidated order.

2. The assessee has raised following grounds of appeal

1. *On the facts and in the circumstances of the case and in law the Ld-CIT (A) erred in not considering that the assumption of jurisdiction by the Ld. Assessing Officer is bad in law as the conditions laid down under the Act for initiating reassessment proceeding have not been fulfilled.*

2. *On the facts and in the circumstances of the case and in law, the Ld, CIT (A) erred in applying 12.50% of the Purchases of Rs.1,81,69,414/- as alleged bogus purchase, without appreciating the fact that the payment was made through cross account payee cheque and the same goods were subsequently sold and quantity is tallied.*

3. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) failed to notice that the Shri Rajendra jain has retracted the statement given on 03.10.2010 and 05.12.2013 and the appellant has submitted the same before the Ld. CIT (A), however the Ld- CIT (A) failed to notice the same and slated that the subsequent statement given by the Rajendra Jain on 05.12.2013 has not been retracted.*

4. *The appellant craves leave to add, alter or delete all or modify any or all the above grounds of appeal.*

3. The revenue has raised following grounds of appeal

1(a) *"Whether on the facts and in circumstances of the case and in tow, the Ld.CIT(A)erred in directing the Assessing Officer to work out 12.50% of the so called bogus purchases made from four parties and add back the same to the taxable income in place of the addition of Rs.1,81,69,414/- made u/s.69C by working out the peak credit. ?"*

1(b) *"Whether on the facts and in circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that there was no compliance to the letter issued to the four bogus parties and, thus, the genuineness of the purchases from the said parties has not been established and the addition made by the Assessing Officer u/s. 69C by working out the peak credit ought to have been sustained."*

4. The brief facts of the case are that the assessee company is engaged in the business of dealing in diamonds, filed its return of

income of AY 2007-08 on 29/10/2007, declaring total loss of Rs. 10,75,598/-. The assessment has been completed u/s 143(3) of the I.T.Act, 1961, on 11/09/2009, determining total loss at Rs. 9,77,188/- Subsequently, the case has been reopened u/s 147 of the I.T.Act, 1961, by issue of notice u/s 148, dated 28/03/2014, on the ground that income chargeable to tax had been escaped assessment, on account of accommodation entries of purchases obtained from suspicious/Hawala dealers from companies controlled and operated by Shri. Rajendra S.Jain. In response to notice, the assessee vide letter dated 26/04/2014 submitted that return filed u/s 139(1) on 29/10/2007 be treated as return filed in compliance to notice issued u/s 148 of the I.T.Act, 1961. Thereafter, the reasons for reopening has been communicated to the assessee. The assessee vide letter dated 08/06/2014 filed objections for reopening of assessment and the objections filed by the assessee has been disposed off vide order dated 07/10/2014. Thereafter, the case was selected for scrutiny and notices u/s 143(2) and 142(1) of the Act, were issued. In response, the assessee through its Authorized Representative appeared from time to time and filed various details as called for. During the course of assessment proceedings, the AO called up on the assessee to furnish necessary evidences in respect of purchases claims to have made from certain parties, on the basis of information received from DGIT (Inv.), Mumbai, as per, which search conducted in the case of Rajendra S. Jain reveals that his companies are involved in providing accommodation entries to various beneficiaries. In response, the assessee has filed basic details, including purchases bills and stock details to prove that purchases from those parties are supported by necessary evidences. During the course of

assessment proceedings, the AO, in order to verify the genuineness of purchases claims to have made from certain parties, issued 133(6) notices to all parties. In response, all parties have furnished. The information called for by the AO, including ledger extracts, confirmation of transactions, income tax returns filed copy and bank statements. The Ld. AO, after considering the relevant submissions of the assessee and also taken note of statement of Shri Rajendra S.Jain and Surendra Jain came to the conclusion that although, the assessee had filed basic evidences to prove purchases, but failed to file further evidences in the back drop of clear findings by the Sales Tax department, during search conducted in the case of Rajendra S.Jain that the assessee is one of the beneficiary of accommodation entries of bogus purchases from four parties controlled and operated by Rajendra S.Jain amounting to Rs. 1,81,69,414/- and accordingly, made additions u/s 69C of the I.T.Act, 1961, as unexplained expenditure.

5. Aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). Before the CIT(A), the assessee has challenged reopening of assessment, on the ground that the AO has reopened assessment, after period of four years from the end of assessment year and therefore, when original assessment was completed u/s 143(3) of the I.T.Act, 1961, before reopening of assessment after period of four years, the AO should allege that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of assessment. The assessee has also filed detailed explanation, in respect of additions made by the AO towards unexplained expenditure towards

purchases from four parties. The Ld.CIT(A), after considering relevant submission of the assessee and also by relied upon various judicial precedents, rejected ground taken by the assessee challenging reopening of the assessment, on the ground that the AO has reopened, assessment on the basis of information received from DGIT (Inv.), which clearly proves escapement of income and also assessment has been reopened after period of four years, as per the provisions of section 149 r.w.s. 151 of the I.T.Act, 1961. Therefore, there is no error in reopening of assessment. As regards additions made towards purchases from four parties amounting to Rs. 1,81,69,414/-, the Ld.CIT(A) has observed that although, search and seizure carried out by the investigation wing clearly established the fact that Shri Rajendra S.Jain was involved in providing accommodation entries, but fact remains that the statement of Shri Rajendra S.Jain was subsequently retracted along with affidavit. Therefore, the issue cannot be looked into in isolation with retracted statement. The Ld.CIT(A), further observed that the assessee has filed necessary details, including purchases bills and payment proof against purchases and also filed complete quantitative details of stock movement. The Ld.AO neither pointed out any mistakes in books of accounts nor made out a case of sales outside books of account or mismatch of purchase and sale of Diamonds. Therefore, he opined that when the AO was not doubted sales declared by the assessee, the purchases cannot be doubted, because sales without purchases cannot be possible. Therefore, by following the decision of Hon'ble Gujarat High Court in the case of CIT vs. Simit P.Seth [356 ITR 451 (2013)] scaled down additions made by the AO towards alleged bogus purchases to 12.5% of so called bogus

purchases from above four parties. Aggrieved by the CIT(A) order, the assessee, as well as the revenue is in appeal before us.

6. The first issue that came up for our consideration from the assessee's appeal from ground No.1 is validity of reopening of the assessment. The Ld. AR for the assessee submitted that, the AO was incorrect in reopening of assessment, after a period of four years from the end of the relevant financial year without any allegation in the reasons regarded for reopening of the assessment that there is a failure on the part of assessee to disclose fully and truly, all material facts necessary for assessment. The Ld. AR, further submitted that as per the provision of section 147(b), if an assessment is reopened after a period of four years and the original assessment was completed u/s 143(3) of the I.T.Act, 1961, then, before reopening of assessment, the AO should allege that income chargeable tax has escaped assessment, for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for that assessment year. In this case, if you go through reasons recorded for reopening of the assessment, there is no iota of evidence in the reasons recorded by the AO that, there is a allegation from the AO, in respect of discloser of information necessary for assessment. In absence of any allegation from the AO regarding true and fully and discloser of information necessary for assessment, the assessment cannot be reopened after a period of four years from the end of relevant assessment year. The Ld. AR, further submitted that the AO has not applied his mind to the information received by him from the DGIT (Inv), which is evident from the fact that the assessment has been

reopened, on the basis of information received from the DGIT (Inv.), without any application of mind on his own. It is a well settled position of law that reopening notice has been issued by the AO on his own satisfaction and not on borrowed satisfaction. In this regard, he relied upon, the following judicial precedents:-

- i) Tao Publishing (P.) Ltd. V DCIT,Circle-7,Pune [2015] 53 taxmann.com 146 (Bombay).
- ii) Sound Casting (P.) Ltd. Vs. DCIT [2013]33 taxmann.com 374(Bombay).
- iii) The Pr. Commissioner of Income Tax 5 vs. M/s. Shodiman Investments Pvt. Ltd. ITA NO, 1297 OF 2015 (Bombay High Court).
- iv) Shilpi Jewellers Pvt. Ltd. vs. Union of India &Ors. in Writ Petition No. 3540 OF 2018 (Bombay High Court).
- v) Shri Ostwal Diamond Pvt. Ltd. vs. ITO, Ward 2(5) in ITA No.3653/Mum/2017 & 2270/Mum/2018 (Mumbai ITAT).
- vi) The Principal Commissioner of Income Tax-17 vs. M/s Mohommad Haji Adam & Co. in ITA NO. 1004 OF 2G16(Bombay High Court).
- vii) M/s AJM & Co. vs DCIT - 15(1)(1) in ITA No.4567/Mum/2017 (Mumbai ITAT).
- viii) Nitin Gupla vs Income Tax Officer, Ward-47(4) in ITA No.2266/Del/2017 (Delhi ITAT).
- ix) Hiralal Motilal Jewellers vs AC1T Circle-43 in ITA No.1045/Kol/201 8 (Kolkata ITAT).
- x) Shanti vijay Jewels Ltd, vs. DCIT Rg 8(3) in ITA No.1045/Mum,2016 (Mumbai ITAT).
- xi) Indo Unique Trading Private Limited vs DCIT - 5(2)(1) in ITA No,6341/Mum/2016 (Mumbai ITAT).

7. The Ld. DR, on the other hand, strongly supporting order of the Ld.CIT(A), on reopening of the assessment submitted that the AO has reopened assessment, on the basis of information received from DGIT(Inv.), which constitutes fresh tangible material, which is sufficient to form a reasonable belief of escapement of income within the meaning of section 147 of the I.T.Act, 1961. The fact that, the AO has recorded reason, on the basis of information is sufficient to allege that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Therefore, there is no merit in the arguments of the assessee that, assessment cannot be reopened after four years from the end of relevant assessment year without any allegations in the notice. The Ld. DR, further submitted that in respect of addition made by the AO towards alleged bogus purchases, although the Ld. AO has brought out various reasons to come to conclusion that purchases from those parties are bogus, which are not supported by necessary evidences, but Ld. CIT(A) has altogether taken a different view and estimated 12.5% profit without assigning any reason. Therefore, the findings given by the Ld.CIT(A) is contrary to facts brought on record and accordingly, the additions made by the AO towards alleged bogus purchases should be upheld.

8. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. The assessee has challenged reopening of assessment, on the ground that when assessment has been reopened after four years from the end of relevant assessment year, the proviso of section 147 of the

I.T.Act, 1961, comes into operation, as per which, no action u/s 147 of the I.T.Act, 1961, shall be taken under this section after the expiry of four years from the end of relevant assessment year, unless, any income chargeable to tax has escaped assessment by reasons of the failure on the part of the assessee to disclose fully and truly all material facts necessary for that assessment year. In this case, there is no dispute with regard to the fact that the assessment for the impugned assessment year has been completed u/s 143(3) of the I.T.Act, 1961. It is also not in dispute that assessment has been reopened, after four years from the end of relevant assessment year. Therefore, as argued by the Ld.AR for the assessee proviso to section 147 of the Act, 1961 comes into operation and accordingly, the AO should allege that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. In this legal background, if you go through reasons recorded for reopening of assessment, which is part of paper book filed by the assessee, it is abundantly clear that nowhere in the reason recorded by the AO, there is allegation from the AO that there is a failure on the part of assessee to disclose fully and truly all material facts necessary for assessment. Unless, the AO allege that the assessee has not fully and truly disclosed all material facts for assessment in original assessment proceedings then, the assessment cannot be reopened after a period of four years from the end of relevant assessment years. This legal proposition is supported by the decision of Hon'ble Bombay High Court in the case of Sound casting Pvt.Ltd. Vs. JCIT [2012 250 CTR 119 (Bombay)], where the Hon'ble High Court held that when reopening of assessment has admittedly taken place beyond the period of four

years from the end of the relevant assessment year, and also there is no allegation in the reasons, which have been disclose to the assessee that there was any failure on his part to fully and truly disclosed all material facts necessary for assessment for that assessment year, the reopening of assessment after four years was bad in law. This legal proposition is further supported by the decision of Hon'ble Bombay High Court in the case of Tao Publishing Pvt.Ltd. DCIT (2015 317 ITR 155), where it was held that the assessee has not made a full and true disclosure of facts is one of the jurisdictional requirements for reopening of assessment, after a period of four years and once this was not the basis for issuance of notice for assessment, it cannot be held against the assessee that it had failed to make a true and full disclosure. Further, it will have to be held that the assessee did not failed to make full and true disclosure of all material facts, the jurisdictional requirements for carrying out for the reassessment, after the expire of four years was not fulfilled in the instant case. In this case, on perusal of reasons recorded by the AO ,we find that there is no iota of observations from the AO regarding failure, on the part of assessee to fully and truly disclose all material facts necessary for assessment. On the other hand, the assessee has filed various details to prove that the information regarding purchase from certain parties was already disclosed to the AO in original assessment proceedings u/s 143 (3) of the I.T.Act, 1961, where in response to query, the assessee has filed complete details about purchase. Therefore, we are of the considered view that reopening of assessment after four years from the end of relevant assessment year without any allegation in the reasons recorded or in the notice issued u/s 148, that there is failure

on the part of the assessee to disclose fully and truly all material facts necessary for assessment, is bad in law and liable to be quashed.

9. Coming to another aspect of the issue. The reopening of assessment cannot be held to be valid, even on this ground ,because if you go through reasons recorded by the AO, it is very clear that the AO has not applied his mind to the information received by him from the DGIT(Inv.). The Ld.AO has merely issued reopening notice, on the basis of information received from the DGIT(Inv.). This is clearly breach of the settled position of law that reopening notice has to be issued by the AO on his own satisfaction and not on borrowed satisfaction. This legal proposition is supported by the decision of Hon'ble Bombay High Court in the case of Prl.CIT vs Shodiman Investments Pvt. Ltd . in Income Tax Appeal No.1297/2015, order dated 16/4/2018, where the legal position of law has been clearly reiterated and held that the AO cannot issue reopening notice, on the basis of borrowed satisfaction. This legal position has been reiterated by the Hon'ble Bombay High Court in the case of Shilpi Jewellers Pvt.Ltd. vs Union of India & Others in writ petition No. 3540/2018, order dated 08/02/2019, where similar observations has been made, in respect of reopening of assessment. Therefore, we are of the considered view that even on this count, reopening of assessment cannot be held to be valid.

10. In this view of the matter and respectfully following the decisions of Bombay High Court, discussed hereinabove, we are of

the considered view that reopening of assessment is bad in law and hence, the reopening of assessment is quashed.

11. The assessee, as well the revenue has challenged the findings of Ld.CIT(A) in estimation 12.5% profit on alleged bogus purchases. Since, we have already quashed reassessment order passed by the AO, consequent additions made in reassessment proceedings and grounds taken by either parties in their respective appeals becomes academic in nature and hence, grounds of appeal taken by the revenue as well as the assessee are dismissed as infructuous.

12. In the result, appeal filed by the assessee in ITA.No. 2283/Mum/2016 is allowed and appeal filed by the revenue in ITA No. 3234/Mum/2016 is dismissed.

Order pronounced in the open court on this 31 /07/2019

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 31/07/2019
Thirumalesh 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.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai