आयकर अपीलीय अधिकरण,सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A. No.776 &1180/AHD/2017
निर्धारण वर्ष/Assessment Year : 2011-12

1.Albers Diamonds Pvt. Ltd., 5/A, 932, 402, Gopinath Apartment, Jadakhadi, Mahidharpura, Surat.395 003. **[PAN: AAICA 4525 F]**	**Vs.**	1.Income Tax Officer, Ward 1(1) (1), Surat.
2.Income Tax Officer, Ward 1(1) (1), Surat.		2. Albers Diamonds Pvt. Ltd., 5/A, 932, 402, Gopinath Apartment, Jadakhadi, Mahidharpura, Surat 395 003. **[PAN: AAICA 4525 F]**
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

निर्धारिती की ओर से **/Assessee by**	Shri Suchek Anchaliya – CA
राजस्व की ओर से **/Revenue by**	Shri J. K. Chandnani – Sr. DR

सुनवाई की तारीख/ Date of hearing:	22.07.2019
उद्घोषणा की तारीख/Pronouncement on:	27.08.2019

आदेश /O R D E R

PER O.P.MEENA, AM:

1. These are cross appeals filed by the Assessee and Revenue which are directed against the order of ld. Commissioner of Income Tax(Appeals)-1, Surat(in short "the CIT(A)") dated 10.02.2017 pertaining to Assessment Year 2011-12.

I.T.A.No.776/AHD/2017 A.Y. 2011-12: (By the Assessee):

2. The grounds of appeal raised by the Assessee reads as under :

> *"1. On the facts and 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 estimating the profit @ 5% of the Purchases of Rs.11,07,73,186/- 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 and the addition was made without providing any opportunity of cross examination, corroborative evidence and without providing copy of statements relied upon."*

3. Brief facts as discernible from the orders of lower authorities are that the assessee has filed return of income on 10.09.2011 declaring total income of Rs.2,30,378/-. The same was accepted under section 143(1) of the Act. Subsequently an information was received from the Director of Investigation (Inv)-II, Mumbai that a search and survey operations were carried out by the Investigation Wing, Mumbai in the case of Shri Bhanwarlal Jain Group of Mumbai on 03.10.2013. During the year under consideration the assessee has carried out transaction with M/s. Rose Gems Pvt. Ltd. of Rs.11,07,73,186/- which was nothing but accommodation entries as no real business was carried out by M/s. Rose gems Pvt. Ltd. and this bogus nature was confirmed in the statement recorded on oath by one of the directors of the group. It was further stated that the entities of this group were operated solely with the

purpose of facilitation of fraudulent transactions, which includes providing accommodation entries of bogus purchase /sales. After forming belief that the purchases bills of diamonds are bogus, hence, the income of the assessee has escaped assessment, the case were reopened u/s.147 of the Act after obtaining necessary satisfaction of the competent authority. The notice under section 148 of the Act was issued on 19.03.2015 and served upon the assessee. The assessee company vide letter dated 17.04.2015 has requested to treat the original return of income filed on 10.09.2011 as the return filed in response to said notice under section 148 of the Act.

4. The assessee has carried the matter before CIT (A). Wherein the assessee has challenged the validity of reopening of assessment and issue of notice under section 148 of the Act of the Act. The assessee has contended that the assessment has been reopened merely on the basis of information received from DIT (Inv)-II, Mumbai regarding accommodation entries without any independent enquiries. Therefore, the assessment has been reopened on 'borrowed satisfaction' without pointing out any failure on the part of the assessee in making the true and full disclosure of all material facts. The AO was duty bound to demonstrate that there was failure on the part of assessee to disclose all materials facts of the case necessary for assessment. The AO has not conducted any inquiry before issue of notice under section 148 of the Act. Therefore, assumption of jurisdiction under section 148 is without any basis.

The AO has stated that the assessee has obtained accommodation entries for the year under consideration is merely seemed to be based on surmises and assumption as no inquiry before issue of notice under section 148 of the Act was made. Shri Bhanwarlal M. Jain is not a director of M/s. Rose Gems Pvt. Ltd. The purchase party has no relation or contact of whatsoever nature with the said Shri Bhanwarlal M. Jain. M/s. Rose Gems Pvt. Ltd. is assessed to tax. The payment are made through account payee cheques. There should be live link with reasons recorded as held in the case of CIT vs. Kelvinator of India Ltd. [2010] 320 ITR 561/187 Taxman 312(SC). Reliance was placed on various case laws as mentioned in appellate order by the Ld. CIT(A). It was further submitted that retracted statement of third party could not be made basis of reopening of assessment. However, the CIT (A) observed that there was credible information from Investigation Wing Mumbai regarding search and seizure action in the case of Shri Bhanwarlal M. Jain who were found engaged in providing accommodation entries. Therefore, the requirement of section 147 of the Act was clearly met and therefore, reopening of assessment is justified. The assessee was one of such beneficiaries who has received accommodation entries. Therefore, the AO has rightly reopened the assessment. The ld.CIT(A) has also supported his view by placing reliance in the case of Phoolchand Bajranglal v. ITO [1993] 203 ITR 456 (SC) and Dishman Pharmaceuticals & Chemicals v. DCIT

(OSD) [2012] 346 ITR 228 (Gujarat). However, on merit, the CIT (A) has allowed substantial relief by restricting impugned addition to Rs.55,38,660/- being 5% as against the addition of Rs.1,38,46,651/- being 12.5% of total disputed purchases of Rs.11,07,73,186/- made by the AO.

5. Being, aggrieved the assessee filed this appeal before this Tribunal. The learned counsel for the assessee submitted that the notice under section 148 of the Act was issued on 19.03.2015, which was purely based on information received from Director of Investigation (Inv). He invited our attention to the reasons for reopening of assessment recorded by the AO, which are placed at Paper Book Page No. 34, and submitted that the AO had reopened the assessment solely based on the information received from Director of Investigation (Inv)-II, Mumbai, who had informed him that the assessee has taken accommodation entry of Rs.11,07,73,186/- from M/s. Rose Gems Pvt. Ltd. and no real transaction has taken place. Therefore, the reasons are recorded mechanically without application of mind. The reasons further stated that a search under section 132(1) was carried out in the case of Shri Bhanwarlal M. Jain, which is leading entry provider of Mumbai. This group involves in providing accommodation entries of bogus purchase/ sales through benami concerns. The assessee M/s. Albers Diamond Pvt. Ltd. is one of the beneficiary and received accommodation entries from the said party of

Rs.11,07,73,186/-. However, no independent enquiries were made by the AO before issue of notice under section 148 of the Act. The learned counsel for the assessee contended that reasons recorded clearly shows that the AO has not applied his mind to the information received by him from Investigation Wing, and issued notice under section 148 of the Act as no independent inquiry was conducted. Thus, the reasons are based on "borrowed satisfaction" and does not applied his mind. Therefore, the reasons recorded by the AO are bad in law in the light of decision in the case of Pr. CIT v. M/s. Shodiman Investments Pvt. Ltd. I.T.A.No. 1297 of 2015 dated 16.04.2018 of Hon`ble Bombay High Court wherein in para 14, the Hon`ble High Court observed ***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 re-opening notice on the basis of intimation regarding re-opening notice from DDIT (Inv.). This clearly a breach of the settled position of law that re-opening notice has to be issued by the Assessing Officer on his own satisfaction and not on borrowed satisfaction***. The learned counsel for the assessee submitted that Shri Bhanwarlal M. Jain. Shri Bhanwarlal M. Jain is not director in M/s. Rose Gems Pvt. Ltd. The assessee has no transaction whatsoever of nature with him nor purchase party has any relation or contact whatsoever nature with said Shri Bhanwarlal M. Jain.

M/s. Rose Gems Pvt. Ltd. is assessed to tax and filing regular return of income. The copy of return acknowledgement is placed at Paper Book Page No. 95. The copy of confirmation was filed from said party. The said company has filed its copy of ledger account, bank statement, purchase bills and audited balance sheet and books of accounts, which are audited under section 44AB of the Act. These are placed at Paper Book Page No. 59 to 96. The transaction are through banking channel and assessee has made payment by account payee cheques. The reasons recorded for reopening of assessment does not talk of any statement recorded of any director of M/s. Rose Gems Pvt. Ltd. The assessee has filed affidavit from Shri Bhanwarlal M. Jain wherein he has retracted for his statement recorded under section 132(4) of the Act. However, the AO has not provided the copy of statement of Shri Bhanwarlal M. Jain to the assessee. Therefore, the third party statement cannot be relied without cross-examination. The assessee has demanded cross-examination of Shri Bhanwarlal M. Jain, but same was not allowed. Therefore, non allowing opportunity of cross examination renders assessment proceeding as invalid as held by the Hon`ble Supreme Court in the case of Andaman Timber Industries v. Commissioner of Central Excise Kolkata-II [2015] 13 STD 805 (SC) (Civil Appeal No. 4228 of 2006) dated September, 2, 2015. (SC). The learned counsel for the assessee further supported his view by placing reliance in the case of DCIT v. Sanghvi Exports

International Pvt. Ltd. [I.T.A.No. 3305/Mum/2017 – Mumbai ITAT [PB-63-71], M/s. Gopinath Gems v. ITO Ward 3(3)(1) Surat [I.T.A.No. 624 to 629 7637/SRT/2018 dated 01.05.2019] Copy filed PB-18). The learned counsel for the assessee further relied in the case of Shilpi Jewellers Pvt. Ltd. v. Union of India[Writ Petition 3540 of 2018 dated 8.02.2019] (PB-1-8) of Hon`ble Bombay High Court, wherein the Hon`ble High Court observed in para 9 as:***9. In the objections, the assessee had also questioned the quantification of the escaped income of Rs. 33.34 crores. In reply to the petition, the Assessing Officer stated that the same emerges from the information received by him from Investigation Wing. This clearly reflects non-application of mind on the part of the Assessing Officer recording reasons.*** The ld. Counsel contended that the AO has not applied his mind and he has merely acted and initiated reassessment proceedings and issued notice u/s. 148 of the Act on the basis of information of Director of Investigation (Inv) Mumbai which was received by him along with in respect of alleged accommodation entries of bogus bills of purchases alleged to be taken by the assessee. Reliance was also placed on the judgement of Hon'ble Gujarat High Court in the case of CIT v. Indrajit Singh Suri [2013] 33 taxmann.com 281 (Gujarat) wherein where the addition were made on the basis of statement of persons who were not allowed to be cross examined by the assessee, addition were held as a not sustainable. The learned

counsel for the assessee also relying on some decision in the case of Bhatia Diamonds Pvt. Ltd. v. ITO I.T.A.No. 2822/ Del/ 2018 dated 24.06.2019 of Delhi Tribunal. (PB-37) ACIT v. Satyendra Kumar I.T.A.No. 5562/Mum/2017 dated 11.06.2019 of Mumbai Tribunal (PB-101) submitted that the conclusion that the AO has reason to believe that income chargeable to tax as escaped assessment within the meaning of s. 147 of the Act, is not tenable in law. Even on merit, it was submitted that all details of seller party were filed, who is assessed to tax, who had filed confirmation, bank statement and copies of account which are audited under section 44AB of the Act, and the said party is very much in existence, and hence, addition so made is not sustainable in law and on facts in the light of judgement of Hon`ble Gujarat High Court in the case of Pr. CIT v. Tejua Rohitkumar Kapadia (Tax Appeal No. 691 of 2017 dated 18.09.2017) which has been affirmed by the Hon`ble Supreme Court in the case of Pr. CIT Surat v. Tejua Rohitkumar Kapadia [by dismissing SLP No.12670/2018 dated 04.05.2018]. In view of above, after placing reliance on the various decisions of Tribunals, Hon'ble High Court and Hon`ble Supreme Court, it was submitted that reopening of assessment is bad in law.

6. *Per contra,* the Ld. DR supported the order of Ld. CIT (A). The learned D.R. vehemently pointed out that not only there existed new information with the AO from the credible sources, but also that he has applied his mind and recorded the conclusion that the

purchases claimed were non genuine and therefore bogus, which clearly shows that what was disclosed was false and untruthful and in this situation, on the basis of report of Director of Investigation (Inv) Mumbai the AO was right in initiating the reassessment proceedings and issuing notice u/s. 148 of the Act. The ld. D.R. further stated that Ld.CIT(A) has placed reliance on the order of Hon'ble Supreme Court in the case of Phool Chand Bajrang Lal vs. ITO, 203 ITR 456 (SC) wherein the Hon`ble Supreme Court was considering the question of reassessment beyond four years in the case of an assessee firm, and had held that in the case of acquiring fresh information specific in nature and reliable relating to the concluded assessment which went to falsify the statement made by the assessee at the time of original assessment and therefore, he would be permitted under the law to draw fresh inference from such facts and material. The learned D.R. submitted that CIT (A) has relied in the case of Dishman Pharmaceuticals and Chemicals Ltd. vs. DCIT (OSD) [2012] 346 ITR 228 (Guj.) wherein has held that there is no set format in which such reasons must be recorded. It is not the language but the contents of such recorded reasons, which assumes importance. Therefore, contended reopening of assessment based on receipt of information from Investigation Wing was held to be valid. On merit, the learned D.R. submitted relied on the order of the AO and submitted that the CIT

(A) was not justified in restricting the addition to 5% of total purchases.

7. We have heard the rival submissions and perused the relevant material on record. We find that the AO has reopened the assessment merely on the basis of information received from Director of Investigation (Inv)-II, Mumbai without conducting any enquiry at his own. Thus, the reasons recorded was not based on his own satisfaction, but on the borrowed satisfaction, which is clearly discernible from the reasons recorded for reopening of assessment which reads as under:

> ***"In this case, a letter is received from DIT (Inv.)-II, Mumbai through the CIT-I, Surat. As per enclosed Annexure A, the name of the beneficiary viz. M/s. Albers Diamond Pvt. Ltd. is intimated by the DIT (Inv.)-II, Mumbai. The information reflects that the assessee has taken accommodation entries pertaining to bogus transaction. The assessee during the year under consideration has made transaction aggregating to Rs. 11,07,73,186/- from the following party , which are accommodation entries only and no real transaction has taken place.***

Sr. No.	***Name of the concern from whom made transaction***	***PAN***	***Amount***
1	***M/s. Rose Gems Pvt. Ltd.***	***AADCR7141M***	***11,07,73,186***

> ***A search and seizure operation u/s. 132 of I.T. Act was carried out in the case of Shri Bhanwarlal Jain Group, which is leading entry provider of Mumbai. The Group is involved in providing accommodation entries of bogus purchases /sales, through benami concerns. The assessee M/s. Albers Diamond Pvt. Ltd. is one of the beneficiary and received accommodation entries pertaining to bogus purchases / sales from the above mentioned parties***

aggregating to Rs. 11,07,73,186/- which is bogus entry only as no real transaction taken place.

Hence, I have reason to believe that the income exceeding Rs. One lac has escaped assessment for A.Y. 2011-12 by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary in the return of income. In this case, a notice u/s.148 r.w.s. 147 of the Income Tax Act,1961 is required to be issued for re-opening the case of Assessment Year 2011-12."

8. The perusal of above reasons would show that the reasons were based on borrowed satisfaction, as the above reasons did not indicate any enquiry or examination of assessment records by the AO. Thus, the basis of the reasons of the AO was merely framed his opinion on the information provided by the DIT (Inv.)-II, Mumbai. We further find that the assessment has been reopened on the basis of statement given by third party. It is also noticed that in the reassessment order the AO at various instances depicted his reliance on information received from Director of Investigation (Inv) Mumbai without making his own inquiry, thus, the re-opening is based on borrowed satisfaction. Further, the said statement was retracted and an affidavit was filed before the AO. The learned counsel for the assessee has placed reliance in the case of Pr. CIT v. M/s. Shodiman Investments Pvt. Ltd. I.T.A.No. 1297 of 2015 dated 16.04.2018 of Hon`ble Bombay High Court wherein in para 14, the Hon`ble High Court observed ***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 re-opening notice on the basis of intimation regarding re-opening notice from DDIT (Inv.). This clearly a breach of the settled position of law that re-opening notice has to be issued by the Assessing Officer on his own satisfaction and not on borrowed satisfaction. We further find that the AO has made quantification of escaped income which is also based on information received from DIT (Inv.)-II, Mumbai in which it was stated that M/s. Rose Gems Pvt. Ltd. has provided accommodation entries aggregating to Rs.11,07,73,186/-. However, there is no whisper that said information was verified for return of income by the AO before recording reason for reopening of assessment. In this context, we note that the Hon`ble Bombay High Court in the case of Shilpi Jewellers Pvt. Ltd. v. Union of India [Writ Petition 3540 of 2018 dated 08.02.2019] (PB-1-8) observed in para 9 as:***9. In the objections, the assessee had also questioned the quantification of the escaped income of Rs. 33.34 crores. In reply to the petition, the Assessing Officer stated that the same emerges from the information received by him from Investigation Wing. This clearly reflects non-application of mind on the part of the Assessing Officer recording reasons.*** *The facts in the instant case are identical, hence, squarely applied to present case.* The above statement suggests that even quantification of escaped income of Rs.11.07 crores is also based on information supplied by the Director of Investigation (Inv) and

the AO has not verified these figures from the return of income filed by the assessee and assessment records. There is no mentioned or reference of filing of any return of income by the assessee in the reason so recorded by the AO. Considering the facts and circumstances and above discussed judicial ruling Co-ordinate Bench of Tribunals, Hon'ble High Court and Hon`ble Supreme Court, we are of the view that reopening of assessment in the present case, is bad in law. We observe that the AO has not applied his mind and he has merely acted and initiated reassessment proceedings and issued notice u/s. 148 of the Act on the basis of information of Director of Investigation (Inv) Mumbai which was received by him along with in respect of alleged accommodation entries of bogus bills of purchases alleged to be taken by the assessee. We note that Learned Counsel has relied in the case of CIT v. Indrajit Singh Suri [2013] 33 taxmann.com 281 (Gujarat) wherein where the addition were made on the basis of statement of persons who were not allowed to be cross examined by the assessee, addition were held as a not sustainable. We find that that the AO has not provided the statement of Shri Bhanwarlal M. Jain to the assessee. The third party statement cannot be relied without allowing cross-examination. The assessment records showed that the assessee has demanded cross-examination but same was not allowed. The assessee has filed affidavit from Shri Bhanwarlal M. Jain wherein he has retracted for his statement recorded under

section 132(4) of the Act. His affidavit was not examined. Thus, non allowing opportunity of cross examination renders assessment proceeding as invalid as held by the Hon`ble Supreme Court in the case of Andaman Timber Industries v. Commissioner of Central Excise Kolkata-II [2015] 13 STD 805 (SC) (Civil Appeal No. 4228 of 2006) (PB-83)dated September, 2, 2015. (SC) held that not allowing the assessee to cross examine witnesses by Adjudicating Authority though statements of those witnesses were made basis of impugned order, amounted to serious flaw which makes impugned order nullity as it amounted to violation of principle of natural justice.

9. In the light of above discussion and facts and circumstances and judicial decision of Tribunals, Hon`ble High Court and Hon`ble Supreme Court, we are of the considered opinion that reopening of assessment has been made on the basis of borrowed satisfaction as held by the Hon`ble Bombay High Court Pr. CIT v. Shodiman Investment (P) Ltd. [2018] 93 taxmann.com 153 (Bombay) / [2018] 2 CTR 380 (Bombay) and Shilpi Jewellers Pvt. Ltd. v. Union of India[Writ Petition 3540 of 2018 dated 08.02.2019] is not justified and not allowing opportunity of cross examination renders assessment proceeding as nullity as held by the Hon`ble Supreme Court in the case of Andaman Timber Industries v. Commissioner of Central Excise Kolkata-II [2015] 13 STD 805 (SC) (Civil Appeal No. 4228 of 2006) dated September, 2, 2015. (SC) and CIT v. Indrajit Singh Suri [2013] 33 taxmann.com 281 (Gujarat).

Therefore, respectfully following the above ruling, the appeal of the assessee is allowed.

10. In the result, the appeal of the assessee stands allowed.

I.T.A.No.1180/AHD/2017 (By the Revenue):

11. Ground No. 1 to 4 raised by the Revenue are against the restriction of addition of Rs. to Rs.55,38,660/- as against the addition of Rs.1,38,46,650/- made by the AO.

12. Since, we have allowed the appeal of the assessee in above I.T.A.No.776/AHD/2017 for the assessment year 2011-12 in favour of the assessee. Therefore, the grounds of appeal of raised by the Revenue have become infructuous, and academic in nature, hence, same are treated as dismissed. Accordingly, appeal of revenue is dismissed.

13. In the result, the appeal for the assessment year 2011-12 of the assessee is allowed and appeal of Revenue is dismissed.

14. The order is pronounced by listing the case on the Notice Board under Rule 34(4) of Income Tax Appellate Tribunal Rules 1963.

Sd/-	**Sd/-**
(BHAVNESH SAINI)	**(O.P.MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Surat: Dated: August 27th, 2019/opm
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / TRUE COPY / /

Assistant Registrar, Surat