

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER**

**ITA NOs. 3462, 3463 & 3464/MUM/2018
(A.Ys: 2009-10, 2010-11 & 2011-12)**

Shri Laxman D Daware Prop. Yogeshwar Metals Ground Floor Shree Bhawan Compound Near Shiv Sena Branch 4 th Khetwadi Lane Mumbai – 400 004 PAN: AEYPD5303H	v.	The Income Tax Officer Ward-19(2)(1) 2 nd Floor, Matru Mandir, Tardeo Road Mumbai – 400 007
(Appellant)		(Respondent)

Assessee by : Shri Prakash Pandit
Department by : Shri Chaitanya Anjaria

Date of Hearing : 09.08.2019
Date of Pronouncement : 30.09.2019

ORDER

PER C.N. PRASAD (JM)

1. These appeals are filed by the assessee against different orders of the Learned Commissioner of Income-tax (Appeals)-54, Mumbai [Hereinafter for short "Ld. CIT(A)] for the A.Ys. 2009-10, 2010-11 and 2011-12 in confirming the action of the Assessing Officer in reopening of

assessment u/s. 147 of the Act and estimating the profit element on alleged bogus purchases.

2. Assessee has raised following common grounds in all these three appeals except for the figures: -

“1. In the facts and circumstances of the case and in law the learned CIT(A) erred in confirming A.O's action of reopening the assessment under section 147 r.w.s. 148 of the Act

2. In the facts and circumstances of the case and in law the learned CIT(A) erred in estimating profit at 9.36% of the alleged bogus purchases of Rs. 1,07,55,229/-, when the books of accounts of the assessee were not rejected u/s. 145 of the Income Tax Act 1961.

3. In the facts and circumstances of the case and in law the learned CIT(A) erred in estimating profit at 9.36% of the alleged bogus purchases of Rs 1,07,55,229/-,

4. The assessee craves for leave to add, amend, alter, modify or omit any of the aforesaid Grounds of Appeal as occasion may arise or demand.”

3. Briefly stated the facts are that, based on the information received from the DGIT(Inv.), Mumbai which in turn received information from the Sales Tax Department that the assessee availed accommodation entries from various parties, the assessments for the A.Ys. 2009-10, 2010-11 and 2011-12 were reopened and the re-assessments were completed u/s.143(3) r.w.s 147 of the Act treating the purchases made by the assessee from various parties as non-genuine as mentioned in the assessment order. The purchases were treated as non-genuine for the reason that assessee has not produced any transportation details and has

furnished only ledger account and cheque payments and no confirmations were filed from the dealers. The Assessing Officer concluded that the assessee made purchases only in the grey market and obtained only accommodation bills from various parties. He also observed that notice issued u/s. 133(6) of the Act to the parties and the same were unserved and returned back. For these reasons the Assessing Officer treated the purchases as non-genuine. However, the Assessing Officer keeping in view the decision of the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Seth [356 ITR 451] and Bholanath Polyfab Pvt. Ltd [355 ITR 290] estimated the profit element from such purchases at 12.5%.

4. Assessee challenged the re-assessment order before the Ld.CIT(A) and on two grounds firstly the reopening of assessment and secondly estimation of profit element at 12.5% treating the purchases as bogus. Ld.CIT(A) as far as the re-opening of assessment is concerned sustained the action of the Assessing Officer in reopening the assessment placing reliance on various decisions including the decision of the Hon'ble Supreme Court in the case of ACIT v. Rajesh Jhaveri Stock Brokers (P) Ltd. [291 ITR 500]. Coming to the merits of the case Ld.CIT(A) confirmed the estimation of profit element at 12.5% of the non-genuine purchases. However, he directed the Assessing Officer to reduce the gross profit already declared by the assessee on these alleged bogus purchases.

5. Ld. Counsel for the assessee submits that in so far as the A.Y.2009-10 is concerned the assessment was made u/s. 143(3) of the Act and in the course of the assessment proceedings the details of purchases were called for and assessee has submitted all the details in respect of the sundry creditors and therefore re-opening of assessment is only on mere change of opinion. Reliance is placed on the following decisions: -

- (i) *Varshaben Shantabhai Patel vs. ITO (282 CTR 75)*
- (ii) *CIT v. Kelvinator India Ltd. [320 ITR 561 SC]*
- (iii) *Asian Paints Ltd. v. DCIT [308 ITR 195 Bom]*
- (iv) *CIT v. Prima Paper & Eng. Industry [364 ITR 222 Bom.]*
- (v) *PCIT v. Meenaxi India Ltd. [395 ITR 677 Delhi]*
- (vi) *PCIT v. RMG Polyviny [396 ITR 5 Delhi]*

6. Coming to the merits of the case, it is submitted that assessee produced books of account, bills, and vouchers for verification. Assessee also produced item wise stock registers, purchases were routed through stock register, and therefore, the purchases are genuine. It was also contended that the Assessing Officer merely on the basis of the information received from DGIT(Inv.), Mumbai and without making any further independent investigation treated the purchases as non-genuine and estimated the profit element at 12.5% and Ld.CIT(A) reduced the Gross profit disclosed by the assessee and restricted the addition. Ld. Counsel for the assessee submits that in view of various decisions of

various Benches the Ld.CIT(A) is not justified in restricted the addition by excluding only gross profit declared by the assessee.

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

8. We have heard the rival submissions and perused the orders of the authorities below. We find that the assessments were reopened by recording the following reasons by the Assessing Officer: -

“Reasons for re-opening of the assessment u/s. 147 of the Act.

In the above case, assessment u/s. 143(3) has been completed on 15.12.2011 on a total income of Rs.5,15,610/-

2. Assessee is engaged in the business of trading in Ferrous and Non Ferrous Metals and pearl metals.

3. Information has been received from the DGIT (Inv.) Wing, Mumbai, that there was a scam unearthed by the Sales Tax Department regarding issue of hawala bills or accommodation entries by several parties in Mumbai which is availed of by several assesseees in order to inflate the purchases or expenses and thereby reduce the tax liabilities.

4. The records of the assessee for the year under consideration reveal that the assessor has adopted this modus operandi during the year under consideration.

5. Details of the parties who have issued accommodation bills to the assessee are as under: -

Sr.No.	Name of the hawala parties	Bill amount
1	M/S. RELIANT METAL CORPORATION	5,07,130
2.	P.M. STEEL ALLOYS	78,69,965
3.	MERCURY METAL CORPN.	11,95,740
4.	ASIAN METAL INDUSTRIES	3,04,200
5	RISHAB METAL (INDIA)	3,53,171
6	NATIONAL STEELS	5,25,023
	TOTAL	1,07,55,229

6. On the basis of the aforesaid information available with the undersigned, I have reason to believe that income chargeable to tax, as indicated above, to the tune of Rs. 1,07,55,229/-, or any other income chargeable to tax which comes to my notice subsequently in the course of proceedings for re-assessment, has escaped assessment for A.Y. 2009-10 within the meaning of section 147 of the IT Act 1.961. I am, therefore, satisfied that the assessee has failed to disclose true and complete particulars of his income for the year under consideration. Accordingly, the case is being proposed to be re-opened u/s. 147 of the Income Tax Act for A.Yr. 2009-10.

7. As per the Proviso to Sec. 151(1) of the Income tax Act 1961, permission of the Jt. Commissioner of Income tax, Range 16(3), Mumbai is hereby sought to re-open the case: of the assessee for A.Y. 2009-10 by issue of notice u/s. 148 of the Income tax Act 1961.

Put up for kind perusal and sanction please.

(OMANA A NAIR)
I.T.O. 16(3)(1), MUMBAI"

9. We find almost similar reasons were recorded for reopening of assessments for the A.Ys. 2010-11 and 2011-12. On a perusal of the reasons recorded, we observe that the Assessing Officer reopened the assessment based on a specific information received from Sales Tax Authorities and also from the DGIT(Inv.) that the assessee had availed accommodation entries from various dealers listed in the reasons itself and the bill amounts for which the transactions were recorded from these parties. Before issuing the reasons for reopening the Assessing Officer examined the records of the assessee for the years under consideration and found that assessee had obtained bogus bills from various parties. In the circumstances, we are of the view that the assessments were reopened based on specific information received from the DGIT(Inv.),

Mumbai and there are tangible materials came on record after making the assessment u/s. 143(3) of the Act and after passing intimation u/s.143(1) of the Act. As there is a specific information coming after completion of assessment we are of the view that there is no change of opinion by the Assessing Officer. In other words, the Assessing Officer acted upon the specific information coming into his possession after completion of assessment. We observe that the Ld.CIT(A) sustained the reopening of assessment observing as under: -

“6.4 The section merely says that the AO has to have reason to believe that any income chargeable to tax has escaped assessment. Reason to believe can be on the basis of any information which comes to his possession or knowledge. The information received by the Ld.AO is more than enough for any reasonable person to form a reason to believe that income has escaped assessment. Further, the information is not anonymous information but authenticated information received from the Investigation Wing of the Department. The AO or any reasonable person in his place would not ignore or over look this kind of information. If the AO is not satisfied with the reason, he would not have issued notice u/s.148. The very fact that reasons are recorded and notice u/s.148 is issued goes to show that the AO has applied his mind and satisfied himself about the re-opening of the case. The reasons recorded are not vague and scanty but precise and concrete. In the instant case, the information has come from the Investigation wing of the same department with supporting statements and modus operandi. There is no reason or occasion to disbelieve this information. Besides, what the Act envisages is that the AO should only have a reason to believe to re-open a case. He need not establish beyond doubt that there is escapement before issuing the notice. This can be done at the time of assessment but not at the time of issue of notice.

6.5 Reliance is placed on the following judgements:

1) *Rohilkhand Educational Charitable Trust vs. CCIT and Others 365 ITR 233(All.) wherein the Hon'ble High Court held AO should have relevant and credible material with him to form requisite reason to believe that income of assessee has escaped assessment. Material available on record has*

rational connection and relevant bearing on such formation of belief for issuing valid notices for re-assessment - sufficiency or correctness of material was not to be considered at this stage.

2) *Sun Pharmaceutical Industries Ltd. Vs. DCIT 353 ITR 474 (Guj.) where the Hon'ble High Court held formation by belief by AO is essentially within his subjective satisfaction - at the stage of issue of notice, only question is whether there was relevant material on which reasonable person could have formed requisite belief.*

3) *N.K. Industries Ltd. vs. ITO 362 ITR 542 (Guj.) where the Hon'ble HC held if a particular issue is brought to the notice of the AO by audit party and AO of his /her application of mind finds this ground as valid, reopening of assessment cannot be quashed merely because such ground was brought to the notice of AO by the audit party.*

4) *The Hon'ble Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. 291 ITR 500 held that if the AO for whatever reason, has reason to believe that income has escaped assessment, it confers jurisdiction to re-open the assessment, where the case is not covered by proviso to section 147, intimation u/s. 143(1) cannot be treated to be an order of assessment and there being no assessment order u/s.143(1), the question of change of opinion does not arise. The Hon'ble Supreme Court further held that the word 'reason' in the phrase 'reason to believe' would mean cause or justification. If the AO has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that the income had escaped assessment. The expression cannot be read to mean that AO should finally ascertain the fact with legal evidence or conclusion."*

10. 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: -

“16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word “reason” in the phrase “reason to believe” would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in *Central Provinces Manganese Ore Co. Ltd. v. ITO* [1991 (191) ITR 662], for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is “reason to believe”, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see *ITO v. Selected Dalurband Coal Co. Pvt. Ltd.* [1996 (217) ITR 597 (SC)]; *Raymond Woollen Mills Ltd. v. ITO* [1999 (236) ITR 34 (SC)]).

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.”

11. 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 Assessing Officer warranting reopening, is not relevant.

12. 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. In the circumstances, we hold that since the assessment was reopened based on tangible materials and information coming into the possession of the Assessing Officer at a later stage, we hold that the reopening of assessment u/s 147 of the Act is valid, hence the ground raised by the Assessee against reopening of assessment is dismissed.

13. Coming to the merits of the case, we find that the Ld.CIT(A) considering the evidences on record, the submissions of the assessee and the averments of the Assessing Officer sustained the action of the Assessing Officer in estimating the profit element at 12.5% observing as under: -

“8.4 The submissions of the Id.Counsel have been carefully considered. According to the appellant all the six parties from whom alleged bogus purchases were made were registered under the local sales tax law having VAT numbers allotted by the Sales Tax Department. The purchases affected from these parties are duly recorded in the books of the appellant and are evidenced by the invoices issued by them. The stock register is also maintained by the appellant, which reflects the purchases and the sales. The goods purchased from these six parties have been sold to various customers and payment to the purchases parties have been made through proper banking channels. The appellant relied upon various case laws cited supra the facts of which are not relevant to the instant case.

8.5 The Ld.AO tried to verify the genuineness of the purchases by issuing notices u/. 133(6) to the parties. However, the notices were returned back. The assessee could not file vital documents like delivery challans, transport receipts etc. Mere filing of the evidence in support of purchases and payment made through account payee cheques cannot be conclusive in a case where genuineness of the transaction is in doubt, as the purchases from the alleged parties which are recorded in the books of accounts could not be proved to be genuine, the Ld.AO had rejected the books of accounts u/s. 145(3) and estimated a profit of 12.5% of the alleged bogus purchases as additional income of the assessee.

8.6 As the parties could not be produced and no confirmations were filed from the parties, the genuineness of the purchases remained to be established beyond doubt. Therefore, it can be presumed that the assessee had made purchases because the corresponding sales have been disclosed and accepted by the Ld.AO. But the purchases may have not been made from the alleged hawala parties but from grey market, thereby resulting in additional

profit to the assessee. Therefore, a reasonable profit element has to be added to the income of the assessee which has been estimated at 12.5% by the Ld.AO.

8.7 Coming to the addition made, the Hon'ble ITAT, Ahmedabad "C" Bench in the case of Vijay Proteins Ltd. Vs ACIT 58 ITD 0428 held that in similar circumstances, 25% of the purchase price accounted through fictitious invoices has to be disallowed. The goods must have been received from other parties. The likelihood of the purchase price of these alleged purchases being inflated could not be ruled out and therefore the Hon'ble High Court has upheld the decision of CIT (A) and the ITAT disallowing 25% of the payments made to such parties. The Hon'ble High Court of Ahmedabad in the case of CIT vs Simit P. Sheth 365 ITR 0451 held that once the sale is accepted by the AO, the very basis of purchases could not be questioned. Not the entire purchase price could be disallowed but only the profit element embedded in such purchases could be added to the income of the assessee. The estimation varies with the nature of business and no uniform yardstick could be adopted.

8.8 The Ld.AO has estimated this profit at 12.5%. As the purchases could not be established as genuine, the estimation made by the Ld.AO of 12.5% of the alleged bogus purchases is confirmed. However, the Ld.AO is directed to allow the GP already declared by the assessee on these alleged bogus purchases. These grounds of appeal are PARTLY ALLOWED."

14. Ongoing through the order of the Ld.CIT(A), the submissions of the assessee and the assessment order, we are in agreement with the lower authorities that the purchases made by the assessee were not proved to be genuine and in view of the fact that there is no dispute in sales by the assessee only the profit element from the purchases made by the assessee should be considered for disallowance. Keeping the nature of business conducted by the assessee being "Ferrous and non-ferrous metals" we direct the Assessing Officer to estimate the profit element from

such purchases at 5% uniformly for all the three years on the alleged bogus purchases. The case laws relied on by the Ld. Counsel for the assessee were considered and found that they were rendered based on facts of those cases and cannot uniformly apply to all the cases.

15. In the result, appeals of the assessee are partly allowed as indicated above.

Order pronounced in the open court on the 30th September, 2019

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER
Mumbai / Dated 30/09/2019
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

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