

**आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई।**

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

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND**

**SHRI AMARJIT SINGH, JUDICIAL MEMBER**

आयकर अपील सं/ I.TA Nos. 2510 & 2511/Mum/2018

(निर्धारण वर्ष / Assessment Years:2009-10 & 2010-11

**M/s.Krishna Sales & Marketing,**  
801,Business Classic, 8<sup>th</sup> floor,  
Chincholi Bunder Road,  
Off.S.V.Road,Malad(West),  
Mumbai. 400 064.

Income Tax Officer-30(2)(4),  
Mumbai.

Vs.

**PAN: AAIFK 2739 C**

(Appellant)

(Respondent)

अपीलार्थी ओर से/ Appellant by : Shri S.M.Bandi, A.R

प्रत्यर्थी की ओर से/Respondent by: Smt.Jothilakshmi Nayak, D.R

सुनवाई की तारीख / Date of Hearing : 21.11.2019

घोषणा की तारीख /Date of Pronouncement : 17.12.2019

आदेश / ORDER

**PER RAJESH KUMAR ACCOUNTANT MEMBER**

Both these of appeals of the assessee are directed against the common order of Id.CIT(A)-41,

Mumbai dated 09.03.2018 for assessment years 2009-10 & 2010-11.

2. The assessee has raised the various grounds for our consideration as under:-

"Ground No.1

*The Id.CIT(A) has grossly erred in law as well as on facts in confirming the action of the AO of reopening the assessment u/s.148 of the I.T.Act, which is void-ab-initio and bad in law.*

Ground No.2

*The Id.CIT(A) has grossly erred in law as well as on facts in confirming the action of the AO of making an addition of Rs.53,19,602/- treating the loan & interest as in genuineness Transaction.*

Ground No.3

*The AO has grossly erred in law as well as on facts in making an addition of Rs.4,30,000/- on account of Commission Expenses."*

2.1 The first ground of appeal is against the action of Id.CIT(A) confirming the order of the

Assessing Officer in re-opening of assessment u/s.148 of the Act.

3. The facts in brief are that the assessee filed return of income on 04.09.2009, declaring a total income of Rs.25,19,770/-, which was processed/s.143 (1) of the Act. Subsequently, the case was assessed u/s.143(3) of the Act by framing order on 07.12.2011 accepting the returned income. Thereafter, the AO received information from DCIT(Investigation) that the assessee have availed bogus loan entries from entities engaged in the business of providing accommodation entries in the form of bogus unsecured loans, bogus purchases and bogus capital gains etc which are related to or connected with Shri Bhanwarlal Jain and his Group. The said facts came to light during the course of search conducted u/s.132 of the Act on Shri Bhanwarlal Jain and group associated concern. In the statement recorded during the course of search proceedings Shri Bhanwarlal Jain admitted that he and associate concerns were engaged only in providing bogus secured loans, bogus share capital without doing any business. Accordingly, the case was reopened u/s.147 of the Act on the ground that income to an extent of Rs.53,19,602/- has escaped assessment, which is an unsecured loan from Kothari & Co taken during the year. Notice/s.148 of the Act was issued on 18.02.2015, which was duly served on the assessee. Thereafter, the assessee submitted before the AO that the return filed on 04.09.2009 may kindly be treated as return in compliance to the aforesaid notice. During the course of assessment proceedings, the AO issue some notices u/s.131 of the Act on 12.02.2016 to Sh.Lunkaran Parasmal Kothari, proprietor of Kothari & Co., directing the said person to appear on 22.02.2016 for examination. However, none attended before the AO and finally the assessment was completed by making an addition of Rs.53,19,602/-, in the assessment framed vide order u/s.143(3) r.w.s.147 of the Act dated 17.03.2016.

4. The assessee challenged the order of the AO before the Id.CIT(A) on the ground reopening of assessment being bad in law, which was dismissed by the Id.CIT(A) by observing and holding as under:-

*"7. I have carefully considered the submissions of the appellant. I have also perused the finding so the AO in the assessment order. My observations are as under"-*

*7.1 So far as the validity of re-opening is concerned, it is found that the reason for reopening was provided by the AO wherein bogus purchases made by the assessee as per*

*information from the office of the DGIT(Inv) has been mentioned. There was a search & seizure action in the case of Shri Bhanwarlal Jain and Group concerns on 03.10.2013 by the Investigation Wing of the Department and specific information related to accommodation entries provided by the concerns of Shri Jain to the appellant was forwarded to the AO. The findings during the course of Search & post Search enquiries provide that Shri Jain & his concerns were providing accommodation entries without actual supply of goods. Therefore, notice u/s.148 was issued on the basis of fresh information and tangible material. To conclude, various grounds challenging the validity of notice u/s.148 are dismissed as they are without merits and re-opening was based on specific information. Hence, the Ground No.1 is rejected."*

5. The learned A.R. of the assessee vehemently submitted for us that the order of the Id.CIT(A) upholding the re-opening of assessment u/s.147 of the Act is patently wrong and against the provisions of the Act and various other judicial pronouncements. The learned A.R. of the assessee submitted that assessee filed return of income on 04.09.2009 whereas the last date of filing of return was 30.09.2009. The last date of assessment year was 31.03.2010 and four (4) years from the date of ending of the relevant assessment year was elapsed on 31.03.2014, whereas the notice u/s.148 was issued on 18.02.2015, apparently four years after the end of the relevant assessment year. Learned A.R. of the assessee submitted that in order to reopen the competed assessment, after expiry of four years, the first proviso to Section 147 of the Act is applicable and the conditions as envisaged therein have to be satisfied. The said proviso provides that no reopening u/s.147 of the Act can be done unless escapement of income is attributed on the part of the assessee to make a return u/s.139, or in response to notice issued u/s.142(1) of the Act or u/s.148 of the Act, or to disclose fully and truly all material facts necessary for assessment, for that assessment year. The learned A.R. of the assessee submitted before the Bench that assessment in this case was framed u/s.143(3) of the Act vide order dated 17.12.2011 wherein the returned income was accepted. The learned A.R. of the assessee submitted that during the course of reopening of assessment proceedings, the AO has specifically raised query in the questionnaire issued along with notice issued u/s.142(1) of the Act dated 03.08.2011 vide para-10 calling upon the assessee to file the confirmed copy of accounts of unsecured loans/advances received giving name, PAN, address, assessment details etc.. In response, the assessee has replied vide letter dated 05.10.2011 vide para -7(a)& 7(b) wherein stated as under:-

*“7(a). Details of Unsecured Loans in the format as called.*

*7(b) Copy of Loan Confirmations duly signed and confirm by Loanees are enclosed herewith.”*

The learned A.R. of the assessee further submitted that the assessee has filed all the necessary details /confirmations of the said secured loans raised during the year from Kothari & Co. in response to a query raised by the AO during the assessment proceedings. The Id counsel of the assessee, therefore, submitted that the reasonable presumption is that the issue stood examined by the AO during the assessment proceedings and subsequent reopening of assessment based on the same material or facts is bad in law and not permissible at all. The learned A.R. of the assessee submitted that during the original assessment proceedings, the assessee filed the confirmations, bank statements, balance sheet, ITRs of the lenders before the AO. Thereafter, the learned A.R. of the assessee drew our attention to page-6 of paper book wherein the copy of reason recording for reopening of assessment of assessee u/s.147 is given. The learned A.R. of the assessee pointed out that reason has been recorded primarily focussing on the fact following search on Shri Bhanwarlal Jain and Group and statement recorded u/s.132(4) of the Act. It was accepted by Shri Bhanwarlal Jain and its employees of its concern were engaged in issuing bogus entries of purchases , unsecured loans and bogus share capital and the assessee is one of the beneficiary of bogus entries in the form of bogus unsecured loans received from Kothari & Co., amounting to Rs.53,19,602/-, including of interest. The learned A.R. of the assessee while taking us through the reasons recorded submitted that the reasons recorded nowhere it has been stated that the income has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material fact necessary for assessment, for that assessment year. The learned A.R. of the assessee submitted that during the original assessment proceedings, informations/details as called for by the AO were furnished and thereafter the AO accepted the loan raised after examining the same. The learned A.R. of the assessee prayed that the reasons recorded are based upon the same materials, which just a change of opinion and based on borrowed satisfactions, which is not valid under the law. The learned A.R. of the assessee summing up his arguments on the issue, further submitted that no tangible material was available before the AO at the time of reopening of assessment proceedings, but based on the

information received from the Search party. Secondly, the issue was examined in the original assessment proceedings, and the assessee had truly and fully disclosed all material facts and thus, reopening of assessment after four years is bad in law. The Id. Counsel of the assessee relied on a series of decisions in defence of his arguments and prayed that the re-assessment proceedings and the consequent order may be quashed.

6. The learned D.R. on the other hand relied strongly on the orders of the Authorities below by submitting that in this case, the AO received formation from DCIT(Inv), who conducted search on Shri Bhanwarlal Jain and his group and the assessee was found one of the beneficiaries of hawala transaction of bogus unsecured loans to the tune of Rs.53,19,602/-, therefore it cannot be said that there was no tangible material before the AO. On the issue of application of mind, learned D.R. submitted that the AO while recording the reasons, duly discussed the statements recorded u/s.132(4) and 131 of the Act and then came to a conclusion that income has in fact escaped. On the issue of reopening after four years, the learned D.R. submitted that the income has escaped because the assessee has taken bogus loan entries from Kothari & Co and this will be a lapse on the part of the assessee and therefore, the reopening of the assessment was validly done and may please be confirmed.

7. After hearing both the parties and perusing the materials on record, we observe that in this case, the notice u/s 148 of the Act was issued after the four years from the end of the relevant assessment year, therefore re-assessment/re-opening proceedings u/s 147 of the Act cannot be done, unless and until the assessment is attributed to the non-disclosure or not filing of the necessary information either in the return of income or during the course of original assessment proceedings by the assessee. In this case, the assessee has fully disclosed all the information before the AO and those were duly examined during the course of assessment proceedings. More particularly, the AO vide letter dated 03.08.2011, made a specific query vide para-10, which was responded by the assessee vide letter dated 05.10.2011 para-9(a) & 7(b) of the said letter. Thus, the issue stands scrutinised by the AO Income Tax Officer 19(3)(2) in the original assessment

proceedings. Moreover there is no failure on the part of the assessee to disclose any material fact during the course of scrutiny, thus we can reasonably presume that there is no fault on the part of the assessee to disclose material information fully and truly during assessment proceedings and therefore, the reopening of assessment on this count cannot be sustained. Besides, the information received from the Search Party is there, but there is no further application of mind by the AO and the AO has relied only on borrowed satisfaction. Therefore, on this count also, the re-assessment proceedings cannot be sustained. In the case of PCIT Vs. Shodiman Investments Pvt Ltd. ITA No. 1297 of 2015 order dated 16.04.2018, the Hon'ble Bombay High Court has dismissed the appeal of the revenue as not having any substantial question of law thereby affirming the order of the tribunal wherein it has been held that where the AO has not applied his mind to the information received from the DDIT(Inv.) and merely issued notice on the basis of DDIT (Inv) is the breach of the settled position in law that the notice re-opening assessment has to be issued based on the satisfaction of the assessing officer and not borrowed satisfaction. Respectfully following the ratio laid by the Hon'ble jurisdictional High court , we quash the reopening proceedings and also the consequent assessment framed.

8. In the second ground of appeal the assessee has challenged the addition on merits. Even on merits assessee has a very strong case. We observe that during the course of assessment proceedings and re-assessment proceedings, the assessee has filed all the necessary evidences in the form of confirmation of loan, balance sheet, ITR and PAN of lender, its name and addressees etc. However, the AO has not carried out any further verification. Only the AO has issued notice u/s.131 of the Act, which remained non-complied by the lender. We further note that the assessee has, time and again, requested for the cross-examination of the Shri Bhanwarlal Jain and other employees, who gave the statements and also sought the copies of statements which is being used against the assessee, however, we find that the same was not supplied to the assessee and no cross examination was allowed. Even on this ground, the addition cannot be sustained and appeal of assessee is allowed.

9. In the 3<sup>rd</sup> ground of appeal , the assessee has challenged the confirmation of addition of Rs. 4,30,000/- made towards commission expense. Since we have allowed the appeal on legal issue as well as on merits , the addition does not survive and the AO is directed accordingly.

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

ITA No.2511/Mum/2018 of Assessee's Appeal

11. The issue raised in ground No.1 is challenged the action of Id.CIT(A) confirming the order of the Assessing Officer in re-opening of assessment u/s.148 of the Act.

12. We have already decided the facts wherein in ITA No.2510/Mum/2018, we have held that reopening is bad in law and on account of fact that the issue was already examined and there was no independent material before the AO, though in this case reopening was done within 4 years, but even on the decision of change of opinion and borrowed satisfaction, the reopening cannot be upheld and accordingly, the re-assessment is quashed by following the ratio in PCIT Vs. Shodiman Investments Pvt. Ltd. ITA No. 1297 of 2015 order dated 16.04.2018, the Hon'ble Bombay High Court(supra).

13. The issue raised in Ground No.2 and 3 need no adjudication as we have already quashed the reopening of assessment.

14. In the result, the appeal of the assessee is allowed.

15. To sum up, both the appeals of the assessee for the assessment years 2009-10 & 2010-11 are allowed.

**The order pronounced in the open court on 17.12.2019**

**Sd/-**

**(AMARJIT SINGH)**

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 17.12.2019

KSS , Sr. PS

**Sd/-**

**(RAJESH KUMAR)**

लेखा सदस्य / ACCOUNTANT MEMBER

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**