THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri Mahavir Singh (JM) & Shri Shamim Yahya (AM)

I.T.A. No. 792/Mum/2017 (Assessment Year 2009-10)

Mr. Chirag R. Shah E-29, 2nd Floor Hiren Shopping Centre M.G. Road, Goregaon (W) Mumbai. PAN : AVQPS7888H	Vs.	ITO 31(1)(3) Mumbai.
(Appellant)		(Respondent)

Assessee by	Shri N.M. Porwal
Department by	Shri Akhtar H. Ansari
Date of Hearing	19.09.2019
Date of Pronouncement	07.12.2019

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against order of learned CIT(appeal) dated 2.9.2016 and pertains to assessment year 2009-10.

2. The grounds of appeal read as under :-

1. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeal) erred in

(a) arriving at the conclusion that purchases made of Rs. 1881261/- from parties mentioned in assessment order are not genuine and not made from them but from other sources.

(b) confirming estimation of profit element @ 8% on alleged non genuine purchases of Rs.23515773/- which is over and above the normal profit declare @ 1.63% in books of accounts.

(c) confirming addition of Rs. 1881261/- made by the Assessing Officer to the total income of the appellant.

2. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeal) erred in confirming action of the Assessing Officer of rejection of books of accounts of the appellant by invoking provisions of section 145(3) of the Act.

3. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in and failed to appreciate that

(a) Proceeding initiated under section 147 /148 of the Act is on the basis of reason to suspect and not on reason to believe.

(b) There is no new tangible material in possession of the Assessing Officer which justify issuance of notice u/s 148 of the Act

(d) The initiation of proceeding under section 147 of the Act and issuance of notice under section 148 is bad in law and contrary to the provisions of the Act and liable to be cancelled/annulled

4. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming order made under section 143(3) rws 147 of the Act by the learned Assessing Officer which is illegal, bad-in-law, ultra vires and without allowing reasonable opportunity of the hearing, without appreciating the facts, submission and evidences in their proper perspective, without providing copies of material used against the appellant and without providing cross examination, same is liable to be annulled.

5. The learned assessing officer erred in charging interest under section 234A, 234B, 234C and 234D of the Act.

3. This appeal by the assessee was earlier disposed of by this tribunal vide ex parte order dated 7.9.2017 subsequently in miscellaneous application moved by the assessee the said order was recalled. Pursuant to the aforesaid recall we have heard this appeal. In this case, the assessee is an Individual engaged in the business of trading in ferrous and non-ferrous metals under the name & style of M/s Chirag Enterprises. The assessee had filed his return of income for A.Y. 2009- 10 on 28.09.2009 declaring a total income of Rs. 3,31,681/-. The same was assessed u/s 143(3) of the Act on 30.12.2011 and the total income of the assessee was determined at Rs. 5,29,180/-. Subsequently the AO received information from the office of the DGIT(Inv), Mumbai/Sales Tax Department, Mumbai that the assessee is a beneficiary of bogus bills of purchases issued by certain suspected hawala dealers. The information was that the concerned dealers had not sold any actual goods but had given bogus bills of sales made to the assessee. The AO noted that the assessee has taken accommodation entries from seven hawala dealers totaling

Rs. 2,35,15,773/-. Accordingly the AO initiated action section 147 of the Act In the reassessment proceedings the AO issued notices u/s 133(6) of the Act to the alleged hawala dealers but the notices could not be served on the dealers by the postal authorities as the dealers were not available at the declared addresses or were 'not known'. When the AO confronted the assessee about the same the assessee claimed that he has the relevant purchase invoices, delivery challans and ledger accounts of the suppliers and the payments have been made by cheques. The AO disputed the claim of the assessee and noted that no delivery challans, lorry receipts or other transportation details have been produced by the assessee.

4. The AO held the purchases to be bogus on the basis of the statements made by the alleged dealers before the Sales Tax Authorities admitting that they have not made any actual sales but they only provide accommodation entries of expenses. The AO also noted that no stock records or transportation bills were produced by the assessee. The AO however accepted the sales and held that the assessee must have made purchases also but these purchases were not made from the alleged hawala dealers. In view of the above facts the AO rejected the books of accounts of the assessee u/s 145(3) of the Act and calculated a g.p. of 8% on the bogus purchases of Rs.2,35,15,773/- and held that the resultant amount of Rs. 18,81,261/- as taxable profit element in the bogus purchases.

5. Against the above order, assessee appealed before the learned CIT(A). The CIT(A) confirmed the validity of reopening of the case as well as action of the Assessing Officer in making addition of 8% of the bogus purchase.

6. As regards the reopening of the case, learned CIT(A) held that the arguments of the assessee are considered and it is held that these have no force. That the AO had reopened the proceedings after having reasons to believe that the income of the assessee has escaped assessment. That the assessing officer had information that the suspect Hawala dealers have given

statements to the Sales Tax Department that they are only providing accommodation entries of bills of purchase and they are not genuinely dealing with any item of trade. The set off claimed for VAT declared paid on the bills of purchase from the bogus hawala dealers is itself evidence that the income of the assessee has escaped assessment.

7. Learned CIT(A) further observed that the reasons recorded by the AO in this case before issue of the notice u/s 148 are very specific and the source of the information is clearly spelt out. That the Gujarat High Court in the recent case of Peass Industrial Engineers Pvt Ltd vs. DCIT in SLA No. 3249 of 2016 Dated 05/08/2016 had discussed a similar situation where the information about the bogus purchases had been received by the AO from the Investigation Wing of the Department. That the High Court after considering the various case laws on the subject has upheld the issuance of notice u/s 148 of the Act with the following decision:

> "we are of the opinion that when the Authority is armed with the tangible material in the form of specific information received by the Investigation Wing, Ahmedabad is thoroughly justified in issuing a notice for reassessment. It is revealed from the said additional material available on hand a reasonable belief is formed by the Assessing Authority that income of the petitioner has escaped assessment and therefore, once the reasonable belief is formulated by the Authority on the basis of cogent tangible material, the Authority is not expected to conclude at this stage the issue finally or to ascertain the fact by evidence or conclusion, we are of the opinion that function of the assessing authority at this stage is to administer the statute and what is required at this stage is a reason to believe and not establish fact of escapement of income and therefore, looking to the scope of Section 147 as also Sections 148 to 152 of the Act, even if scrutiny assessment has been undertaken, if substantial new material is found in the form of information on the basis of which the assessing authority conform a belief that the income of the petitioner has escaped assessment, it is always open for the assessing authority to reopen assessment. From the reasons which are recorded, it clearly emerges that the petitioner is the beneficiary of those entries by Kayan brothers, who are well known entry operators across the country and this fact has been unearthed on account of the information received by DGIT Investigation Branch and therefore, it cannot be said in any way that even if four years have been passed, it is not open for the Authority to reopen the assessment. In the present case, there was independent application of mind on behalf of the assessing authority in arriving at the conclusion that income had escaped assessment and therefore, the contentions raised by the petitioner

> are devoid of merits. Dealing with the contentions of the petitioner that the information received from DGIT, Investigation Branch, Ahmedabad, can never be said to be additional information. We are of the opinion that the information which has been received is on 26.3.2015 from the DGIT, Investigation Branch, Ahmedabad, whereby it has been revealed that present petitioner is also the beneficiaries of those Kayan brothers, -who are in the activity of entry operation throughout the country and therefore, it cannot be said that this is not justifiable material to form a reason to belief by the Authority and therefore, this being a case, the Authority is justified in issuing notice under Section 148 of the Act to reopen the assessment and therefore, the challenge contained in the petition being devoid of merits, same deserves to be dismissed."

8. Referring to the above learned CIT(A) opined that this decision is direct on the issues involved in the present case and is squarely applicable. That further at the time of issuing a notice u/s 148 of the Act the AO is only required to possess a prima facie view and the AO is not required to have absolute proof. This is declared in the following decisions:

> (a) Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC) In this case it was held that insufficiency of reasons could not be a ground for quashing of the notice under section 148 at its threshold.
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> (b) Shree Bajrang Commercial Co. (P.) Ltd. [2004] 269 ITR 338 (Cal.).
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> (c) CIT v. Nova Promoters & Finlease (P) Ltd [2012] 342 ITR 169 (Delhi). In this case the question as whether at stage of issuing notice under section 148 merits of matter are not relevant and Assessing Officer at that stage is required to form only a prima facie belief or opinion that income chargeable to tax has escaped assessment? The answer was given in the affirmative.

9. Further learned CIT(A) observed that it is further seen that in this connection that the following observations of the Supreme Court in the case of Income-Tax Officer, Cuttack and Others Vs. Biju Patnaik (1991) 188 ITR 247 are very relevant:-

> "It is undoubtedly true that the notice does not prima facie disclose the satisfaction of the two conditions precedent enjoined under section 147(a), but in the counter affidavit filed by the Income tax Officer in the High Court, he stated all the material facts. The respondent had inspected the record and the record also bears out the existence of the material facts. The proceedings drawn up which are abstracted earlier also show that the Income tax Officer had applied his mind to the fact on record and "was prima facie satisfied that the reopening of the assessment for the assessment year 1957-58 was needed due to those stated facts. Thus,

> though ex facie the notice does not disclose the satisfaction of the requirement of section 147 (a), from the record and the averments in the counter affidavit, it is clear that the Income tax Officer had applied his mind to the facts and, after prima facie satisfying himself of the existence of those two conditions precedent, reached the conclusion for reopening the assessment. It is settled law that, in an administrative action, though the order does not ex facie disclose the satisfaction by the officer of the necessary facts if the record discloses the same, the notice or the order does not per se become illegal. "(emphasis supplied) In view of the above facts and the above case laws the assessee's challenge to the re-opening of the assessment is rejected."

10. As regards the merits of the case, the learned CIT(A) affirmed the action of the Assessing Officer and also noted that in the appellate proceedings the assessee had produced some copies of the delivery challans but it was seen that the delivery challans appear to be concocted since they were not filed during the assessment stage and the challans have no notation of any person receiving or selling the material. That this fact was noted on order sheet dated 24.08.2016 and the AR has witnessed it by signing.

11. Against the above order, assessee is in appeal before the ITAT.

12. We have heard both the Counsel and perused the records. Learned counsel of the assessee reiterated the submissions before the learned CIT(appeals). He submitted that there is no independent application of mind by the assessing officer. Hence he is submitted that the reopening is not valid.
He further placed reliance upon several case laws including :-

- Pati Ram Vill-Kadipur Vs. ITO (ITA No. 5529/Mum/2013 dt. 7.9.18)
- CIT Vs. Smt. Anjali Dua (174 Taxman 72)
- Jawahar Lal Agarwal Vs. ITO (160 DTR 212)
- Hynoup Food & Oil Industries Ltd. Vs. ACIT (175 Taxman 331)

13. Learned departmental representative on the other hand relied upon the orders of the learned CIT(A). He submitted that there was cogent information that assessee has indulged in bogus purchases. Hence he submitted that the assessment was validly reopened. Learned counsel submitted that the case law from honourable Gujarat High Court in the case of Peass Industrial Engineers

Pvt. Ltd. is squarely applicable, which has been relied upon by the learned CIT(A) and is directly on this very issue and hence he submitted that the reopening should be held to be valid.

14. Upon careful consideration and perused the records we find that assessment has been reopened based upon cogent information received from sales tax department that assessee has indulged in bogus purchases. It is settled law that at the time of recording reasons for reopening the escapement of income need not be proved to the hilt. Furthermore we note that the earlier assessment was done under section 143(1). Honourable Supreme Court in the case of Rajesh Jhaveri Stock Brokers P. Ltd. (291 ITR 500) has held that a processing under section 143(1) cannot be equated with an assessment order and it cannot be held that assessing officer has applied any mind. Subsequent reopening cannot be said to be change of opinion. In this view of the matter in our considered opinion there is no infirmity in the order of learned CIT(A) upholding the validity of reopening. Furthermore the decision of Honourable Gujarat High Court in the case of Peass Industrial Engineers Pvt. Ltd. (supra) relied upon by the learned CIT(A) is very germane and on the very subject. Hence in view of these decisions the other decisions referred by the learned counsel of the assessee are not found to be applicable. Hence we uphold the order of Id CIT(A) on the issue of validity of reopening.

15. As regards merits of the case upon careful consideration we find that the delivery challans have been found by learned CIT(A) to be concocted. The assessee has provided incomplete documentary evidence for the purchase. Adverse inference has also been drawn due to the inability of the assessee to produce the suppliers and absence of complete documentary evidence. We find that in this case the sales have not been doubted. It is settled law that when sales are not doubted, hundred percent disallowance for bogus purchase cannot be done. The rationale being no sales is possible without actual purchases. This proposition is supported from honourable jurisdictional High Court decision in the case of Nikunj Eximp Enterprises (in writ petition no 2860, order dt.

18.6.2014). In this case the honourable High Court has upheld hundred percent allowance for the purchases said to be bogus when sales are not doubted. However in that case all the supplies were to government agency. In the present case the facts of the case indicate that assessee has made purchase from the grey market. Making purchases through the grey market gives the assessee savings on account of non-payment of tax and others at the expense of the exchequer. As regards the quantification of the profit element embedded in making of such bogus/unsubstantiated purchases by the assessee, we find that as held by honourable High Court of Bombay in its recent judgement in the case of principle Commissioner of income tax versus M. Haji Adam & Co. (ITA number 1004 of 2016 dated 11/2/2019 in paragraph 8 there off), the addition in respect of bogus purchases is to be limited to the extent of bringing the gross profit rate on such purchases at the same rate as of other genuine purchases.

16. Respectfully following the aforesaid judgement of the honourable High Court set aside the matter to the file of the assessing officer with the direction to restrict the addition as regards the bogus purchases by bringing the gross profit rate on such bogus purchases at the same rate as that of the other genuine purchases. Needless to add the assessee should be granted adequate opportunity of being heard.

17. In the result assessee's appeal is partly allowed.

Order has been pronounced in the Court on 3.12.2019.

Sd/-	Sd/-
(MAHAVIR SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 3/12/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai

6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
PS ITAT, Mumbai