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

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

ITA No. 7117/MUM/2016 (A.Y:2009-10)

Dy. Commissioner of Income Tax Circle – 6(2)(1) R.No. 563, Aayakar Bhavan M.K. Road, Mumbai – 400 020	*v.*	M/s. Charak Pharma Pvt. Ltd., 21, Evergreen Industrial Estate Shakti Mill Lane, Opp. Dr. E. Moses Road Mahalaxmi, Mumbai – 400 011 **PAN: AABCC4014A**
(Appellant)		**(Respondent)**

Assessee by	**:**	**Shri Ronak G. Doshi &** **Ms. Niyanta Mehta**
Department by	**:**	**Ms. Kavita P.Kaushik**
Date of Hearing	**:**	**17.10.2019**
Date of Pronouncement	**:**	**10.01.2020**

O R D E R

PER C.N. PRASAD (JM)

1. This appeal is filed by the revenue against the order of the Learned Commissioner of Income-tax (Appeals)–12, Mumbai [hereinafter for short "Ld. CIT(A)"] dated 01.09.2016 for the A.Y. 2009-10.

2. Revenue has raised the following grounds in its appeal: -

> *"1.* "On *the facts and circumstances of case and in law, the Ld.CIT(A) erred in deleting the addition made by the assessing Officer on account of Bogus purchase of Rs.31,200/-ignoring the fact*

that the party, M/s Ritesh Corporation had indulged in providing accommodation entries only.".

2. "On the facts and circumstances of case and in law, the Ld.CIT(A) erred in quashing the reopening proceedings without appreciating the fact that the several courts have accepted that mere calling for of information and keeping the same on the record does not tantamount to application of mind".

3. "On the facts and in the circumstances of the case and in law, the appellate order passed by the CIT(A) is prima facie wrong because after having allowed the appeal of the assessee on technical ground that re-opening of the assessment was bad in law, CIT(A) was not right in directing the AO to verify from the records and make necessary rectification, as per law in so far as assessee's ground of appeal no.4 before the CIT(A) was concerned."

4. *The Appellant prays that the order of the CIT (Appeals) on the above grounds be set aside and that of the AO be restored.*

5. The Appellant craves leave to amend or alter any ground or to submit additional new ground, which may be necessary."

3. Briefly stated the facts are that, assessee is engaged in the business of Manufacturing and Marketing of Ayurvedic Pharmaceutical Products e-filed its return on 24.09.2009 declaring income of ₹.2,90,15,018/- which was later revised on 21.07.2010 declaring NIL income. Return was processed u/s. 143(1) of the Act and an assessment was made u/s. 143(3) of the Act on 08.12.2011. Subsequently, the assessment was reopened by issue of a notice u/s.148 of the Act, for the reason that assessee has entered into transaction of bogus purchases for ₹.31,200/- and further assessee had excess setoff of carry forward and accumulated loss and unabsorbed depreciation relating to amalgamating company u/s. 72A of the Act.

4. The re-assessment was completed by the Assessing Officer u/s.143(3) r.w.s. 147 of the Act on 31.03.2015 making addition of ₹.31,200/- towards bogus purchases and further denying the adjustment of carry forward and setoff of accumulated loss and unabsorbed depreciation relating to amalgamating company. The assessee challenged the assessment order before the Ld. CIT(A) in reopening the assessment u/s.147 of the Act and also on merits. The Ld. CIT(A) held that the reopening of assessment is bad in law as it is only a mere change of opinion without there being any tangible materials on record to reopen the assessment.

5. The Ld. DR strongly supported the orders of the Assessing Officer. Ld. DR further submitted that Assessing Officer has recorded proper reasons for reopening the assessment and therefore Ld. CIT(A) is not justified in holding that reopening is bad in law. On the other hand, the Ld. Counsel for the assessee supported the order of the Ld.CIT(A) and also filed submissions.

6. We have heard the rival submissions and perused the orders of the authorities below. On a perusal of the assessment order, we find that assessment was reopened for the reason that the assessee made bogus purchases to the extent of ₹.31,200/- and also set off of its carry forward

and brought forward unabsorbed loss and deprecation relating to amalgamating company which according to the Assessing Officer is not permissible. The Ld. CIT(A) considering the submission of the assessee and taking note of the fact that the assessment was completed u/s. 143(3) of the Act originally and during the course of such assessment proceedings assessee has filed all the relevant details in respect of set off of unabsorbed losses and depreciation relating to amalgamating company and also furnished copy of the High Court order approving the scheme of amalgamation, Ld. CIT(A) held that reopening was done merely on change of opinion and not based on any material on record which has come subsequent to completion of the assessment u/s. 143(3) of the Act. While holding so the Ld. CIT(A) observed as under: -

> *"7.3. I have carefully perused the assessment order and the submission of the appellant. On perusal of the first reason recorded for the reopening of the assessment, it is seen that AO has noted that "as per information on records, it is noticed that the assessee has entered into bogus purchase for Rs 31,200/- . I have therefore reason to believe that such income chargeable to has escaped assessment". The AO has not mentioned from where the information came and what is mentioned in the information, whose statements were recorded and as to how he formed the reason to believe that there was escapement of income. In the order for rejecting the appellant's objection, the AO has noted that specific information has been received from Maharashtra VAT authority that the appellant is a beneficiary of accommodation entry from M/s Ritesh Corporation and the party has given the statement on oath. In the assessment order at para 5.2 , the AO has noted that Sales Tax Department of Mumbai has investigated all these cases thoroughly and hawala operators have narrated the entire modus operandi of the hawala operators and their beneficiaries. It is seen that the AO has not mentioned whose statement was recorded and whether the party has given the name of the appellant that it has given accommodation entry to the appellant. The statement recorded was not made a part*

of the assessment order. Further, it is seen that the appellant has two units, one unit is 100% tax exempt and other is taxable at the 70% of income earned, ie, 30% chapter VI deduction on 80IB unit. It is unbelievable and even against the human conduct and possibility that a company whose income is in crores has engaged in obtaining an accommodation entry for Rs 31,200/-. Even the tax on this amount is very less, that is Rs 9360/-, out of which only 6552/- is the actual tax benefit. Therefore it is not acceptable that the appellant, having a turnover over crores of rupees has taken accommodation entry to avoid tax of Rs 6552/- . Therefore, I do not find merit in reopening of the assessment on this ground.

Secondly, the reason for reopening the assessment is formed on the ground that the share allotted to the amalgamated company are the 10% cumulative redeemable preference shares. The AO has noted that the preference share do not carry voting right except on the matter of fixed dividend, therefore, AO held that the amalgamating company does not have voting right, hence section 79 of the I T Act are not satisfied. Hence, incorrect allowance of loss of Rs 7.03 cr has resulted in under assessment of income by Rs 2.68 cr under normal provision and thereby resulted in excess carry forward of MAT credit by the same amount to succeeding assessment year. It is also noticed that the AO has taken separate working for setting off of carried forward of loss, unit wise, first set off the loss against the 80IC unit and balance loss against 80IB unit and 30% profit arrived after setting of the balance loss under chapter VA is reduced and arrived at taxable profit of 80IB and A.O. has worked out the tax at the rate of 33.99% at Rs 1.20 cr. This is not taken at the time of finalization of the reassessment order. The AO has not discussed the issue of change in opinion in the order for rejecting the objection for reopening the assessment. The AO has relied on the decision of Hon'ble Supreme Court in the case of Kelvinator India Ltd. (320 ITR 561). It is seen that the Judicial decision of Hon'ble Supreme Court relied on by the AO and relevant para noted in the order of rejecting the objection against the reopening the assessment is clearly against the action of the AO, wherein the Hon'ble Supreme Court has held that the AO has no power to review. AO has the power to only reassess. One must treat the concept of change of opinion as an inbuilt test to check abuse of power by the AO. Hence, after 1.4.1989, AO has power to reopen, provided there is tangible material to come to the conclusion that, there is escapement of income from assessment. Reason must have a link with the formation of the belief.

The AO also relied on the decision of Hon'ble jurisdictional High Court in the case of Export Credit Guarantee Corporation of India Ltd. It is seen that in that case the Hon'ble Jurisdictional High Court held that "an assessing officer who has plainly ignored relevant material in arriving at an assessment acts contrary to law. If there is an escapement of income in consequence, the jurisdictional

requirement of section 147 would be fulfilled on the formation of a reason to believe that income has escaped assessment. The reopening of the assessment within a period of four years is in these circumstance within jurisdiction"

I have carefully perused the reason recorded and the appellant's submission on the issue of reopening the assessment. In the instant case, it is necessary to understand whether it is change in opinion or the issue in hand decided is contrary to law which is plainly ignored while completing the assessment. In the case here, the appellant has filed the return which is subsequently revised and assessment order was passed after calling of all relevant details. During the original assessment proceedings the appellant submitted the copy of High Court order approving amalgamation for issue of preference share to transferor company, the details of carry forward loss which was claimed in the computation of income. The appellant also submitted the annual report prior to amalgamation, of both the companies ie Charak Pharma Pvt Ltd. and Charak Pharmaceuticals (I) Pvt Ltd. These evidences establish that the AO has verified these details and formed the opinion though it was not mentioned in the assessment order. Now, it is necessary to consider, whether it was overlooked or A.O. has plainly ignored the material in arriving at the assessment. Therefore, it is necessary to reproduce section 79, at the relevant time here, which is as under :-

> *Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place in a previous year in the case of a company, not being a company in which the public are substantially interested, no loss~ incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year unless—*
>
> *(a) on the last day of the previous year the shares of the company carrying not less than fifty-one per cent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty-one per cent of the voting power on the last day of the year or years in which the loss was incurred –["* * *]:*
>
> *—[Provided that nothing contained in this section shall apply to a case where a change in the said voting power takes place in a previous year consequent upon the death of a shareholder or on account of transfer of shares by way of gift to any relative of the shareholder making such gift:]*
>
> *—[Provided further that nothing contained in this section shall apply to any change in the shareholding of an Indian company which is a subsidiary of a foreign company as a result of amalgamation or demerger of a foreign company subject to the condition that fifty-one per cent shareholders of the*

amalgamating or demerged foreign company continue to be the shareholders of the amalgamated or the resulting foreign company.]

(b) -[Omitted by the Finance Act, 1988, w.e.f. 1-4-1989.]

On perusal of the said section, it is seen in clause (a) of section 79, that, on the day of previous year, the shares of the company carrying not less that fifty one percent of voting power were beneficially held by person who beneficially held shares of the company carrying not less than fifty-one per cent of the voting power on the last day of the year or years in which the loss was incurred.

It is clearly understood that the preference share holders are beneficially share holder who have voting right on the dividend issue. In the said section it is not mentioned that the share should be equity shares only. Similar wording is also noticed in section 2(22)(e), wherein it is specifically noted that "not being shares entitled to a fixed rate of dividend with or without a right to participate in profits. Relevant section, ie 2(22)(e), is as under:

"any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) — [made after the 31 st day of May, 1987, by way of advance or loan to a shareholder — , being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)] or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits- ;"

In section 2(22)(e), the words are same but it specifies that it is not applicable to the shares entitled to a fixed rate of dividend. But this is not appearing in section 79. If the intention of Legislature is to give benefit only to the person having 51% voting power who held only the equity shares, then it must be mentioned in section 79 but section 79 does not speak about the equity shares, only, it speaks about the beneficiary held the shares having 51 % voting power. It also , does not specify which voting power.

Further, in my opinion, principal of beneficial interpretation would apply in such circumstance. The Hon'ble Bombay High Court in the case of Indian Rayon Corporation reported in 231 ITR 26 held that "The principle of beneficial interpretation applies only when there is reasonable and genuine doubt in regard to the interpretation of a

particular provision. It has no application to a case where the provision is clear and the law is well-settled. It cannot be stretched too far. It cannot be used to misinterpret a statutory provision which is otherwise clear and brooks no doubt about its meaning or interpretation just to give benefit to the taxpayer which the statute did not intend to give. The doubt as to the true meaning of the words or language of the statute should be 'real' and not merely conjectural or fanciful. It is not for the Courts to invent fancied ambiguities and stretch or pervert the language of the enactment in favour of the taxpayer. The principle of beneficial interpretation or interpretation in favour of the assessee would, therefore, apply only in a case where, on a proper interpretation, the Court is in doubt about the true scope and ambit of the provision or finds that two equally reasonable interpretations - one in favour of the assessee and the other in favour of the revenue are possible. It is only in such cases that the question of accepting one of the two reasonably possible interpretations would arise. It has no application in a case like the instant one where the words of the statute were plain, precise and unambiguous. In such case, the courts have no option but to give effect to the plain meaning of the statute."

Therefore, it cannot be said that the AO has not applied his mind and he had overlooked / plainly ignored the material before him. Therefore the case law relied on by the AO are not found applicable here.

Further, the AO raised the issue against the issuance of share, ie, the shares were not issued during the financial year 2008-09 relevant to assessment year 2009-10. It is seen, that, for allowing the carry forward and set off the loss where share holding changes then there must be share allotted. But in the instant case, it is seen that the Hon'ble High Court of Mumbai has approved the scheme of amalgamation on 18.12.2009 with appointed date as on 01.01.2009, ie, the scheme has come into effect on 01.01.2009, ie Financial Year 2008-09, but the scheme was approved on 18.12.2009, ie, in the next Financial Year 2009-10. Hence, it is impossible for the appellant to issue the share in financial year 2008-09 ie in the A.Y. 2009-10. So, it can not be held as a non compliance on the part of the appellant. Further in view of Hon'ble Supreme Court decision in the case of Marshall Sons & Co (India) Ltd V/s ITO 223 ITR 809 where in it is held that scheme of amalgamation specifying date of transfer, court not modifying date of transfer- amalgamation takes effect on date of transfer specified in scheme and not on date of courts order. From the date, income of subsidiary company belongs to holding company- during the period of effective date as provided in the scheme of amalgamation to the date of order of High Court approving such scheme, amalgamating company is deemed to have conducted business on behalf on the amalgamated company.

Similarly, Hon'ble Kolkata IT AT in the case of NLC Nalco India Limited v/s DCIT (2015(10) TMI 2236) held that "revised return reflecting the consolidated result of the amalgamated entity was filed beyond the permissible time limit u/s 139(5) of the Act, was due to the fact of delayed passing of the order of the High Court approving the scheme of merger. This delay is definitely not attributable to the assessee and it is not within the control of the assessee."

In view of the aforesaid decision and the peculiar facts & circumstances of the instant case, it cannot be held that the AO has not made opinion but it is clear in view of the above discussion, I find merit in the submission of the appellant. Therefore, Ground No.1 of the appeal is allowed.

8. Ground of Appeal No.2 relates to the addition of Rs 31200/- on account of bogus purchase. The notice u/s 148 is treated as an invalid notice as it is seen that the reopening is based on change in opinion and no proper reason to believe is found in the reason recorded for reopening the assessment. The ground no 1 is given in favour of the appellant hence the ground no 2 of the appeal is not adjudicated upon since it becomes infructuous."

7. On a perusal of the order of the Ld.CIT(A) we do not see any valid reason to interfere with the findings and the decision in holding that the reassessment was made merely on change of opinion and quashing the reopening of assessment. None of the findings of the Ld. CIT(A) have been rebutted with evidences by the revenue. Thus, we sustain the order of the Ld.CIT(A) and reject the grounds raised by the revenue.

8. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on the 10th January, 2020

Sd/-	Sd/-
(RAJESH KUMAR)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 10/01/2020
Giridhar, 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.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum