

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "E", MUMBAI**

**BEFORE SHRI M. BALAGANESH (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 6357/MUM/2017  
Assessment Year: 2009-10**

Tilaknagar Industries Ltd., 3 <sup>rd</sup> Floor, Industrial Assurance Building, J.D. Tata Marg, Churchgate, Mumbai - 400020 PAN: AAAC6047R	<b>Vs.</b>	The Deputy Commissioner of Income Tax, Central Circle 1(1), 9 <sup>th</sup> Floor, Old CGO Annex Building, Mumbai - 400020
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by : Shri Dr. K. Shivram/Rahul Hakani (ARs)  
Revenue by : Shri Amit Pratap Singh / Mohd. Rizwan  
(DRs)

Date of Hearing: 25/08/2020  
Date of Pronouncement: 28/08/2020

**ORDER**

**PER RAM LAL NEGI, JM**

This appeal has been filed by the assessee against the order dated 11.08.2017 passed by the Commissioner of Income Tax (Appeals)-47 (for short 'the CIT(A), Mumbai, for the assessment year 2009-10, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) r.w.s. 147 of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee company engaged in the business of manufacturing Indian made foreign liquor, filed its return of income for the assessment year under consideration declaring total income of Rs. 29,19,12,503/-. The case was selected for scrutiny and the AO passed assessment order on 07.12.2011 u/s 143(3) of the Act, determining the total income at Rs. 29,24,68,540/- after making addition of Rs. 3,53,838/- and Rs. 2,02,195/- on account of disallowance of depreciation and disallowance of expenditure incurred for increase of capital respectively. Subsequently, the AO

reopened the assessment after issuing notice u/s 148 of the Act. The assessment was reopened on the ground that during the year relevant to the assessment under consideration, the assessee had made payment amounting to Rs. 5,11,22,956/- to Sh. Anand Nair towards astrological fees without availing any corresponding services and the assessee failed to disclose fully and truly all material facts necessary before the AO for assessment. Accordingly, the AO after hearing the assessee made various additions and determined the total income of the assessee at Rs. 34,78,42,420/- under normal provisions of the Act and Rs. 32,90,18,510/- under section 115JB of the Act. In the first appeal the Ld. CIT(A) partly allowed the appeal of the assessee. Still aggrieved, the assessee is in appeal before this Tribunal.

3. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

- “1. the ld. CIT (A) erred in upholding the reopening of assessment without appreciating that the document impounded during survey were not related to the appellant, therefore, does not constitute “tangible material”, hence without any tangible material; such reopening of assessment is invalid.*
- 2. The Ld. CIT (A) erred in upholding the reopening of the assessment on the ground of Astrology Fees despite the fact that all the details were before the ld. Assessing Officer during the original scrutiny assessment proceedings for which order u/s 143 (3) of the Act was passed on 07.12.2011.*
- 3. the ld. CIT (A) erred in not only upholding the additions made in reopened assessment on issues not listed in the reasons recorded, but also, enhanced such additions made.*
- 4. The Ld. CIT (A) erred in upholding the action of the ld. Assessing Officer in making addition on the basis of statements of various persons recorded during the course of survey under section 133A of the Act on 13.03.2013 without appreciating the fact that such recorded statement does not have any legal sanctity and cannot be relied upon.*
- 5. The Ld. CIT (A) erred in upholding the action of the ld. Assessing Officer in making an addition of Rs. 49,37,659/- on account of alleged non genuine revenue expenses, despite the fact that:*

*There was no disclosure of any bogus revenue expenses made during the survey u/s 133A dated 13.03.2013 relating to the subject A.Y. 2009-10.*

*The Hon'ble Settlement Commission in the appellant's own case had vide order dated 30.09.2015 has accepted that M/s Great Spirits Marketing and M/s S S Enterprises are genuine parties.*

6. *The Ld. CIT (A) erred in upholding the disallowance of depreciation on astrological fees (Architectural Fees) amounting to Rs. 25,38,823/- and making further enhancement of Rs. 1,77,32,315/- despite the fact that:-*

*The payments were made for the services provided;*

*The recipient had offered the same to tax and paid applicable taxes;*

*The work was evidenced by various e-mails / maps;*

*The Hon'ble Settlement Commission in the appellant's own case had vide order dated 30.09.2015 held the same to be allowable and department has accepted the same;*

*TDS @ 10% have been deducted;*

*Service tax was paid;*

*There is no evidence that services were not provided.*

7. *The Ld. CIT (A) erred in upholding the disallowance of interest expenses of Rs. 1,15,85,155/- under the provisions of Section 36(1)(iii) of the Act and making further enhancement of Rs. 1,87,83,274/- without appreciating that:-*

*The advance were for business purpose*

*The advance were subsequently paid back.*

*The entire advances were given out of own funds and no advances were given out of borrowed funds.*

*The advance to subsidiary M/s Prag Distilleries Pvt. Ltd. was out of commercial expediency.*

8. *The Ld. CIT (A) erred in upholding the disallowance of rental charges amounting to Rs. 26,96,640/- on the alleged ground that the expenses were not for purpose of business. The ld. CIT (A) failed to appreciate that such sums were incurred for genuine business expediencies.*

9. *The Ld. CIT (A) erred in upholding the disallowance of housekeeping charges amounting to Rs. 26,96,640/- on the alleged ground that the expenses were not for the purpose of business. The Ld. CIT (A) failed to appreciate that such sums were incurred for genuine business expediencies."*

4. During pendency of this appeal, the assessee filed revised grounds of appeal contending that the original grounds of appeal are lengthy, argumentative and contain case law. The revised grounds filed by the assessee are as under:

1. *The learned CIT (A) failed to appreciate that reopening of Assessment is bad in law as it tantamount to change of opinion and there did not exist any reason to believe that income had escaped assessment as reopening was not based on any fresh tangible material and hence reopening is bad in law.*
2. *The learned CIT (A) erred in disallowing commission of Rs. 35,94,493/- paid to Great Spirits marketing without appreciating that commission was paid for sale of liquor in Kerala and was paid wholly and exclusively for business purposes and hence disallowance may be deleted.*
3. *The Learned CIT (A) erred in disallowing packing charges of Rs. 2,19,566/- paid to Sai Enterprises without appreciating that same was paid wholly and exclusively for business purposes and hence disallowance may be deleted.*
4. *The Learned CIT (A) erred in disallowing promotional exhibition expense of Rs. 11,23,600/- without appreciating that said expenses are incurred for brand promotion and are incurred wholly and exclusively for business purposes and hence disallowance may be deleted.*
5. *The Learned CIT (A) erred in upholding disallowance of depreciation of Rs. 25,38,823/- made by AO on architectural and management fees paid to Mr. Anand Nair and further enhancing the disallowance to Rs. 1,77,32,315/- without appreciating that payments were genuine and rendering of services was proved and hence depreciation of Rs. 1,77,32,315/- may be allowed.*
6. *The Ld. CIT (A) erred in upholding disallowance of interest of Rs. 1,15,85,155/- u/s 36(1)(iii) and further enhancing to Rs. 1,87,83,274/- without appreciating that advances were made out of own funds and on commercial expediency for business purposes and hence disallowance of interest of Rs. 1,87,83,274/- may be deleted.*

7. *The Ld. CIT (A) erred in upholding disallowance of rental charges of Rs. 29,96,640/- without appreciating that said charges were genuine and were incurred wholly and exclusively for business purpose and hence rental charges may be allowed.*
8. *The Ld. CIT (A) erred in upholding disallowance of housekeeping charges of Rs. 26,96,640/- without appreciating that said charges were genuine and were incurred wholly and exclusively for business purpose and hence rental charges may be allowed.”*

5. At the outset, the Ld. counsel for the assessee submitted before us that the impugned order is bad in law as the Ld. CIT(A) has upheld the reopening by the AO on the basis of change of opinion which is not permitted under law. The Ld. counsel further submitted that once the AO had passed the assessment order after examining and verifying each and every detail furnished by the assessee during assessment proceedings, it had no jurisdiction to reopen the assessment on the basis of the same material. In order to exercise jurisdiction u/s 147 of the Act, the AO must have some tangible material for forming the belief that the income of the assessee has escaped assessment. The Ld. counsel further submitted that original assessment was completed on 07.12.2011. A survey u/s 133A was carried out on 13.03.2013 by investigation wing Pune and based on the outcome of survey, AO recorded the reasons for reopening. The Ld. counsel further contended that since the AO had passed the original assessment order after examining the material furnished by the assessee in response to the notices issued by him, he had no jurisdiction to reopen the assessment passed u/s 143(3) of the Act after changing his opinion. The Ld. counsel placing reliance on the judgments of the Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd. 320 ITR 561 and the Hon'ble Bombay High Court in the case of *State Bank Of India vs. ACIT (2019) 411 ITR 664*, submitted that since the order passed by the Ld. CIT(A) is contrary to the ratio laid down by the Hon'ble Supreme Court and the High Court in the aforesaid cases, the same is liable to be set aside.

6. The Ld. counsel invited our attention to page 31 and 32 of the paper book, which are the copies of notice dated 18.08.2010 and 17.06.2011 issued by the AO u/s 143(2) and u/s 143(2) read with section 129 of the Act; pages 33 to 35 of the paper book which is reply to notice dated 17.06.2011; page 36, copy of notice u/s 133(6) dated 26.08.2011 issued to Sh. Anand P. Nair, Principal Officer, calling for information in assessee's case and other documents on record, to demonstrate that the AO has completed the original assessment after taking into consideration each and every detail called for during the assessment proceedings. The Ld. counsel further invited our attention to the statement of Sh. Amit Dahanukar, Chairman and Managing Director, of the assessee company recorded u/s 131 of the Act on 15.03.2013 (pages 273 to 257 of the paper book) to point out that no question with regard to the payment to Sh. Anand Nair was asked during the survey proceedings. The Ld. counsel further invited our attention to pages 56 to 59, which is the copy of reply to notice dated 19.08.2014 issued u/s 142(1) of the Act and letter issued on 23.12.2014, to explain the payments made to Sh. Nair for architectural and management consultancy services rendered by him. The Ld. counsel further submitted that Sh. Nair issued two debit notes to M/s Prag Distillary Pvt. Ltd. and not to the assessee. (copies of the same are available at page 62 and 63 of the paper book.) The Ld. counsel further pointed out that the copy of MOU at page 64 of the paper book does not relate to the assessee, moreover the same is not relevant to the assessment year under consideration.

7. The Ld. counsel further pointed out that in assessee's appeals ITA No. 5818& 5819/Mum/2016 for the assessment years 2010-11 & 2011-12 the ITAT has directed the AO to allow depreciation claimed by the assessee on architect fees paid to Sh. Anand Nair holding that the expenditure was incurred wholly and exclusively for the purpose of its business.

8. On the other hand, the Ld. departmental representative (DR) supporting the order passed by the Ld. CIT(A) submitted that since, the AO had recorded the reasons for reopening on the basis of the material recovered during survey, the Ld. CIT(A) has rightly upheld the reopening of the assessment by the

assessee. The Ld. DR further submitted that since the AO had not dealt with the issue regarding payments to Sh. Nair, no question of change of opinion does arise. The Ld. DR invited our attention to page 255 of the paper book, which contains reply to question No. 27 asked while recording statement u/s 133A of the Act to substantiate his contention.

9. We have heard the rival contentions of the parties and perused the material on record including the cases relied upon by the authorities below and the cases referred and relied by the Ld. counsel. Admittedly, in the present case the AO passed assessment order u/s 143(3) of the Act. As per the settled law, AO has power to reopen the assessment under section 147 of the Act if he has a tangible material to form a belief that the income of the assessee has escaped assessment and the reasons recorded for reopening must have live link with formation of belief that the income of the assessee has escaped assessment. In the present case, the assessment was reopened on the ground that during survey it came to the notice of the revenue authorities that during the previous year the assessee had made payment of Rs. 5,11,22,965/- to Sh. Anand Nair towards astrological fees, without availing any services and this information was received after completion of u/143(3) of the Act. The AO has further mentioned in reasons recorded that debit notes raised by Sh. Anand Nair and MOU executed between Anand P. Nair and Sh. Amit Dhanukar in this regard were found during survey. As pointed out by the Ld. counsel, the assessee has furnished the details/explanation called for by the AO including the explanation regarding payment to Sh. Nair. The AO has issued notice to Sh. Nair under section 133(6) of the Act. As contended by the Ld. counsel the assessee included the payments made to Sh. Nair and claimed depreciation which is reflected in item No. 8 on page 34 and item No. 3 on page 35 of the paper book, which is the copy of reply to notice dated 17.06.2011. The assessee has contended in its reply to notice u/s 142(1) of the Act that actual amount of Rs. 4,78,12,113/- was paid to Sh. Nair towards architectural and management consultancy fees.

10. Further, during survey action no question was asked from the MD regarding payment to Sh. Nair. We notice that the coordinate Bench has dealt with the issue regarding payment to Sh. Nair in assessee's appeal ITA No. 5818 and 5819/Mum/2019 for the assessment years 2010-11 & 2011-12. We further notice that the coordinate Bench has directed the AO to allow depreciation claimed by the assessee on architect fees paid to Sh. Anand Nair holding that the assessee has incurred the said expenditure wholly and exclusively for the purpose of its business. We further notice that Sh. Anand Nair has issued the debit notes referred by the authorities below, to M/s M/s Prag Distillery Pvt. Ltd. and not to the assessee. So far as the MOU referred by the revenue is concerned, the same has been entered into between Sh. Anand P Nair and Sh. Amit Dahanukar /Mrs. Shivani Dahanukar and not between Sh. Anand P Nair and the assessee company. Moreover, the MOU does not pertain to the assessment year under consideration as the same has been signed by the parties on 16.01.2012.

11. From the facts and circumstances of the case, discussed in the foregoing paras, it can safely be concluded that the AO has passed the original assessment order after taking into consideration each and every detail/explanation furnished by the assessee in response to the notice issued or query raised by him during the course of assessment proceedings. It can further be concluded that the AO had no tangible material for forming the belief that the income of the assessee has escaped assessment. Hence, in our considered opinion since the AO has initiated the reassessment proceedings on the basis of the material already placed on record by the assessee during assessment proceedings, the action of the AO amounts to change of opinion which is not permissible under law. In the case of *CIT vs. Kelwinator of India Ltd.* (supra), the Hon'ble Supreme Court has held that post 01-04-1989, power of AO to reopen u/s 147 is much wider, however, the AO has no jurisdiction to reopen assessment on the basis of mere change of opinion. Powers u/s 147 of the Act can be exercised by the AO provided there is tangible material to come to the conclusion that there is escapement of income from assessment. In our

considered view, the AO had no tangible material to come to the conclusion that income of the assessee has escaped assessment. Similarly, in the case of *State Bank of India vs. ACIT* (supra), the Hon'ble Bombay High Court has granted interim stay to the appellant holding that no notice u/s 148 read with section 147 of the Act can be issued which is based on change of opinion. Hence, respectfully following the ratio laid down by the Hon'ble Supreme Court and the Hon'ble High Court discussed above, we hold that since the AO had initiated reassessment proceedings in the present case on the basis of change of opinion, the Ld. CIT(A) has wrongly upheld the action of the AO. We, therefore, allow the legal ground raised by the assessee and set aside the order passed by the Ld. CIT(A) holding the notice u/s 148 read with section 147 of the Act and the subsequent proceedings as *void ab initio*.

12. Since we have allowed the appeal of the assessee by adjudicating the legal ground raised by the assessee in its favour, we do not deem it necessary to discuss and decide the other grounds raised by the assessee on merits.

In the result, appeal filed by the assessee for assessment year 2009-2010 is allowed.

Order pronounced on 28<sup>th</sup> August, 2020 under Rule 34(4) of the Income Tax Appellate Tribunal Rules, 1963.

Sd/-  
(M. BALAGANESH)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 28/08/2020

Alindra, PS

Sd/-  
(RAM LAL NEGI)

JUDICIAL MEMBER

**आदेश 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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**