

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

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA No.6326/M/2017
Assessment Year: 2011-12**

DCIT 12(1)(1), Room No.223, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Amba Enterprises Ltd., 430, 4 th Floor, Blue Rose Industries, Near Metro Bazar, W.E. Highway, Mumbai – 400 066 PAN: AAFCA6033R
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Nishit Gandhi, A.R.
Revenue by : Shri Michael Jerald, D.R.

Date of Hearing : 05.03.2020
Date of Pronouncement : 27.05.2020

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the Revenue against the order dated 03.07.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12.

2. The Revenue has challenged the order of Ld. CIT(A) on various grounds on merits whereas the assessee has filed application under rule 27 of the Income Tax Appellate Tribunal Rules, 1963 (hereinafter referred to as "ITAT Rules"). The assessee has challenged the reopening of the assessment by the assessing officer (hereinafter referred to as the "AO") on account

of lack of jurisdiction. First we would like to decide the application filed by the assessee under rule 27 of ITAT Rules.

3. The facts in brief are that the assessee is a listed company and filed the return of income on 30.09.2011 declaring total income of Rs.32,36,010/- which was processed under section 143(1) of the Act on 07.01.2012. Thereafter, the case of the assessee was reopened under section 147 r.w.s. 148 of the Act by issuing notice u/s 148 of the Act dated 23.03.2015. The assessment was re-opened after the AO received information from Sales Tax Department, Government of Maharashtra that assessee has obtained bogus purchase bills to the tune of Rs.1,32,41,930/- from M/s. Supreme Enterprises who is a hawala dealer. The assessee has also filed the objections to the reassessment proceedings initiated under section 147 read with section 148 of the Act which were disposed of by the AO vide order dated 11.01.2016. In the said objections the assessee objected to the contents of the reasons recorded by submitting that assessee has never purchased any goods from M/s. Supreme Enterprises. Finally, the assessment was framed vide order dated 31.03.2016 passed under section 143(3) read with section 147 of the Act by making two additions (i) disallowance of bogus purchases Rs.1,32,41,930/- being 100% of the bogus purchase and (ii) Rs.3,25,00,000/- as unexplained cash credit under section 68 towards the increase in share capital during the year thereby assessing the income at Rs.4,89,77,936/- as against the returned income of Rs.32,36,010/-. The assessee has challenged the order of the AO before the Ld. CIT(A) and Ld. CIT(A) dismissed the appeal of the assessee on the jurisdictional

ground whereas on merits, the appeal was partly allowed. Against this order of the Ld. CIT(A), the Revenue is in appeal against the deletion of addition on merits whereas the assessee has filed application under rule 27 of the ITAT Rules challenging the reopening as being without jurisdiction.

4. The rule 27 of the rules under the assessee moved application is reproduced as under for the sake of convenience and ready reference:

“ The respondent though he may not have appealed , may support the order appealed against on any of the grounds decided against him”.

5. On the bare perusal of the above rules it is quite clear that the respondent is entitled to support the order passed by Ld. CIT(A) on any of the grounds decided against him. In the present case, we observe that Ld. CIT(A) has dismissed the appeal of the assessee on the issue of reopening. The Ld. A.R. also referred to various jurisdictional decisions to support his contentions and arguments that assessee may support the order appealed against on any of the grounds decided against him. The Ld. A.R. by way of this rule 27 seeks to challenge the jurisdiction to frame the assessment under the Act by the AO and prayed before this Bench for its indulgence to allow the necessary relief in this regard to the assessee. In the case of PCIT vs. Sun Pharmaceutical Industries Ltd. (2018) 408 ITR 517 (Guj.) ,the Hon’ble Gujarat High Court has affirmed the order of the Tribunal wherein it allowed the application of the assessee under rule 27 challenging the reopening of assessment by the AO. Similarly, in the case of Ld. CIT(A) vs. Sundaram & Co. (1964) 52 ITR 763 (Mad.) the Hon’ble Madras High Court

upheld the order of the Tribunal wherein it quashed the reassessment proceedings which was challenged by way of application under rule 27 of the Rules. Similar view has been taken in the following decisions namely ;

1. Smt. Gurinder Kaur (2006) 102 ITD 189 (Del.)
2. ACIT vs. Rajkumar Jalan IT(SS)A No.28/Del/12.

6. The Ld. D.R., on the other hand, strongly opposed the admission of application of the assessee under rule 27 of the rules challenging the jurisdiction of the AO to frame assessment under section 147 read with section 148 of the Act by referring to the said rules and prayed that the application may kindly be dismissed as assessee is not the aggrieved party and appeal is filed by the Revenue and as such assessee has no locus standi to challenge the order which is decided by Ld. CIT(A) in its favour of the assessee on the merits of the case.

7. Having heard both the sides and perused the material on records particularly rule 27 of ITAT Rules which provides that the respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him. Thus it is apparent that even if the assessee is not in appeal and is a respondent even then the assessee can file the application under rule 27 on any of the issues which are decided against him or it. In the present case, the Ld. CIT(A) has dismissed the jurisdictional issue raised by the assessee against which the assessee has not filed an appeal but has come before the ITAT under rule 27 of the ITAT Rules. Considering the ratio laid down in the above decisions, we are of the considered view that assessee is within its legal and legitimate

rights to seeks the indulgence of this Tribunal by way of application filed under rule 27 of ITAT Rules and accordingly we are inclined to admit the same and proceed to decide the jurisdictional issue in the following paras.

8. The facts in brief are that the assessment was reopened by the AO after recording the reasons to believe under section 148(2) of the Act. The case of the assessee was re-opened after AO received information from Sales Tax Department, Government of Maharashtra that assessee is beneficiary of bogus purchase entries. The reasons recorded u/s 148(2) are extracted as under for the sake of ready reference:

- “1. In this case, assessment proceedings for A.Y. 2011-12 were completed u/s.143(1) on 07.01.2012 at total income of Rs.32,36,010/-.
2. In this case, information was received from office of DGIT (Investigation, Mumbai) in respect of bogus purchases/accommodation bills taken from various entities. The information in the above said case has been received from DCIT 6(1)(1) & (2), Mumbai. On perusal of the details, it is found that M/s. AMBA ENTERPRISES LTD has made bogus purchases/taken accommodation bills of Rs.1,32,41,930/- for F.Y. 2010-11 (A.Y. 2011-12) from the following parties:

Name of the Party	PAN	F.Y.	Amount
SUPREME ENTERPRISES	AKRPM9147P	2010-11	1,32,41,980/-
TOTAL			Rs.1,32,41,930/-

3. In the light of the above findings, it is clear that the assessee has booked bogus purchase to the tune of Rs.1,32,41,930/- from above entities for the Assessment Year 2011-12, thereby reduced its profits by inflating the expenses leading to escapement of income chargeable to tax. Thus, it is proved that the assessment failed to disclose fully and truly all material facts in respect of the purchases necessary for its assessment for the assessment year under consideration.

4. In view of the above, I have reason to believe that the income of Rs.1,32,41,930/- being bogus purchases/accommodation bills, has escaped assessment in the hands of M/s. Amba Enterprises Ltd. in A.Y. 2011-12 as per provisions of section 147 of I.T. Act 1961.

5. Issue notice u/s 148 of the IT Act 1961.”

9. The perusal of the above amply reveals that it has been noted by the AO that assessee has made bogus purchases (accommodation entries) from M/s. Supreme Enterprises amounting to Rs.1,32,41,930/- and consequently the AO concluded that the income of the assessee has escaped to that extent and thus reopened the assessment.

10. The assessee has filed objections to the reopening challenging the reopening of assessment on the ground that reopening was based upon totally wrong and incorrect facts as the assessee had never made any purchases from M/s. Supreme Enterprises. It was specifically pointed out in the objections filed that assessee has never made purchases from M/s. Supreme Enterprises and therefore the reasons recorded were based upon wrong facts. The Ld. A.R. also submitted that the reasons have been recorded in a mechanical manner without application of mind and so much so that even the reasons recorded did not bear any date on which these were recorded. The AO, however, specifically noted during the course of assessment proceedings that assessee has made purchases from M/s. Krupa Trading Co. and both these entities namely M/s. Supreme Enterprises and M/s. Krupa Trading Co. were proprietary concerns of the assessee with the same TIN. The Ld. A.R. strongly submitted that since the AO has not received any information with regard to transactions of the assessee with M/s. Krupa Trading Co and therefore reasons so recorded were without any application of mind and simply based on the information from the investigation wing. The Ld. A.R. contended that it is a settled law that if reassessment is initiated based on

the reasons recorded without any application of mind or based on borrowed satisfaction of the investigation wing or not on objective satisfaction of the AO, then entire reassessment is vitiated and deserved to be quashed irrespective of whether the original assessment under section 143(1) or 143(3) of the Act. In defense of his arguments, the Ld. A.R. relied on the following decisions :

1. PCIT vs. Shodiman Investments Pvt. Ltd. – (2018) 93 Taxman.com 153 (Bombay)
2. Nu Power Renewables Pvt. Ltd. vs DCIT, Circle1(2)
3. Pr CIT Vs Meenakshi Overseas Pvt Ltd.
4. South Yarra Holdings Vs ITO
5. CIT vs. SFIL Stock Broking Ltd. – (2010) 325 ITR 285 (Del)
6. Signature Hotels P. Ltd. vs. ITO – (2011) 338 ITR 0051 (Delhi)
7. M/s. Pransukhlal Brothers vs. ITO – (2015) 229 Taxman 444 (Bombay)

The Ld. A.R. also submitted that in the present case the AO relied on the information which was received at the back of the assessee and was never supplied to the assessee despite specific requests made to the AO during assessment proceedings. Even the assessee was not granted an opportunity to cross examine the parties whose statements were relied upon by the AO despite the specific requests made by the assessee for opportunity to cross examine vide letter dated 04.01.2016. The Ld. A.R. prayed that if an order is passed or addition made without giving a copy of statement or information relied upon by the AO or without granting cross examination of the party whose statement is used against the assessee, the order so passed is bad in law and deserved to be quashed. In defense of his arguments the Ld. A.R. relied on the following decisions :

1. Kishinchand Chellaram vs. CIT – (1980) 125 ITR 713 (SC)
2. CIT vs. Ashish International – ITXA 4299 of 2009 (Bombay High Court)
3. CIT vs. H.R. Mehta – ITXA 58 of 2001 (Bombay High Court)

The Ld. A.R. finally prayed before the Bench that the order passed by the AO is bad in law the assumption of jurisdiction is not as law and may be quashed.

11. The Ld. D.R., on the other hand, strongly opposed the arguments of the Ld. A.R. by submitting that in this case the information was received from the Sales Tax Wing, Government of Maharashtra that the assessee is beneficiary of hawala purchase entries from M/s. Supreme Enterprises and accordingly the reasons were recorded. However, later on during the course of reassessment it was found that the assessee owned two proprietary concerns one is M/s. Supreme Enterprises and the second is M/S Krupa Trading Co having same TIN and therefore no fault can be found out in the reasons recorded. Since the TIN of both the firm was same and hence this mistake has happened which in no way renders the reassessment proceedings invalid as argued by the ld AR. The AR therefore prayed that application filed under rule 27 of ITAT Rules deserves to be dismissed.

12. After hearing both the representatives of the rival sides and perusing the materials as placed before us, we observe that there is no dispute as to re-opening of assessment on the basis of reasons recorded which state that the assessee has made bogus purchases from M/S Supreme Enterprises, a proprietary concern of the assessee in question. The assessee also owns another firm M/S Krupa Trading Co having the same TIN which was noticed by the AO in the re-assessment proceedings. The assessee brought to the notice of AO the fact of having made no purchases from M/S Supreme Enterprises by way of filing objections filed challenging the wrongful re-opening of assessment but the AO simply observed that the though no purchases were made from Supreme Enterprises but the another firm M/S Krupa Trading Co. also belongs to the same assessee and have the same TIN. The 1d CIT(A) also upheld the re-opening as stated above. Now the assessee has assailed the re-opening u/s 147 r.w.s. 148 of the Act on the ground that there was no application of mind by the AO to the information received by the AO from Sales Tax Deptt. Govt of Maharashtra vis a vis the facts of the assessee and re-opening is done on borrowed satisfaction which is not permissible under the Act. After considering the facts of the case, we are of the considered view that since no material has been purchased from the concern namely M/s. Supreme Enterprises as referred to in the reasons recorded which is owned by the same assessee with the same TIN Number, there is non application of mind or absence of linkage of the material received by the AO to the facts of the assessee's case which is certainly fatal and the renders re-opening as well as the consequent assessment as invalid and

bad in law. The case of the assessee is supported by the various decisions of jurisdictional and other High Courts which are discussed as under:

“a) In the case of Pr. CIT Vs. Shodiman Investments Pvt. Ltd. (supra), the Hon’ble Bombay High court has held that where the AO has merely issued re-assessment notice on the basis of intimation from DDIT(Inv.), the re-opening is bad in law as re-opening notice has to be issued by the AO on the basis of his own satisfaction and not on borrowed satisfaction. The relevant paras are reproduced as under:-

13. *In this case, the reasons as made available to the Respondent-Assessee as produced before the Tribunal merely indicates information received from the DIT (Investigation) about a particular entity, entering into suspicious transactions. However, that material is not further linked by any reason to come to the conclusion that the Respondent-Assessee has indulged in any activity which could give rise to reason to believe on the part of the Assessing Officer that income chargeable to tax has escaped Assessment. It is for this reason that the recorded reasons even does not indicate the amount which according to the Assessing Officer, has escaped Assessment. This is an evidence of a fishing enquiry and not a reasonable belief that income chargeable to tax has escaped assessment.*

14. *Further, the reasons clearly shows that the Assessing Officer has not applied his mind to the information received by him from the DDIT (Inv.). The Assessing Officer has merely issued a reopening notice on the basis of intimation regarding reopening notice from the DDIT(Inv.) This is clearly in breach of the settled position in law that reopening notice has to be issued by the Assessing Office on his own satisfaction and not on borrowed satisfaction.*

15. *Therefore, in the above facts, the view taken by the impugned order of the Tribunal cannot be found fault with. This view of the Tribunal is in accordance with the settled position in law.”*

b) In the case of Nu Power Renewables Pvt. Ltd. vs DCIT, Circle1(2) supra the Hon’ble jurisdictional High Court has held that where there is no independent application of mind on the part of the AO to the information received from DDIT(Inv), the reopening of assessment on the basis of such information was without jurisdiction. The Hon’ble court has observed that information received has to be examined in the context of the facts on record before coming to a view that income chargeable to tax has escaped assessment on account of failure to disclose fully and truly all relevant facts and in absence of that it amounts to outsourcing the reasons to believe and impugned notice is without jurisdiction.

c) In the case of, Pr CIT Vs Meenakshi Overseas Pvt Ltd. supra, the Hon’ble Delhi High Court has held that where there is no independent application of mind by the AO to tangible material which formed the basis for reasons to believe that income had escaped assessment and the reasons did not demonstrate the link between the tangible material and formation of reasons to believe that income had escaped assessment. The Hon’ble court observed that the AO has not made any efforts to set out the portion of the investigation report which contains information specific to the assessee and the AO does not even examine the return of income

already filed to ascertain whether entry has been disclosed therein. The court finally observed that the conclusion of the AO is at best a reproduction of the conclusion in the investigation report which is a borrowed satisfaction and therefore the initiation of proceedings u/s 147/148 of the Act to re-open the assessments for the AYs in question does not satisfy the requirement of law.

d) In the case of South Yarra Holdings Vs ITO (supra), the Hon'ble Bombay High Court has held that it is a settled position in law that re-opening has to be done by the assessing officer on his own satisfaction and it is not open to him to issue re-opening notice at the dictate of and/or satisfaction of some authority. Therefore on receipt of information which suggests the escapement of income, the assessing officer must examine the information in the context of the facts of the case and only on satisfaction leading to a reasonable belief that income has chargeable to tax has escaped assessment, a reopening notice is to be issued.

e) In all other decisions referred and relied upon by the Id AR the similar ratio has been laid.

While on the other hand, the Id DR could not demonstrate as to how the AO applied his mind to the information/tangible material and linked the same to the facts of the assessee. In our opinion the AO has not applied his mind to the information received and not recorded his own satisfaction. So much so that the AO has not even bother to examine the fact that assessee has not made purchases from M/s. Supreme Enterprises but in fact the purchases were made from M/S Krupa Trading Co. though both the proprietary concerns belongs to the assessee. We, therefore, observe that there is complete non application of mind and absence of linkage of the information to the facts of the assessee. Further investigation report by itself or per se is not a tangible material unless further enquiry is undertaken by the AO. The case of the assessee is squarely finds support from the decisions as discussed above. Under these facts and circumstances, the initiation of proceeding u/s 147/ 148 of the Act cannot be sustained as the same runs contrary to the ratio laid down above in the various decisions of the Hon'ble

jurisdictional and other High Courts. Therefore we hold the proceedings under 147 of the Act to be invalid and bad in law and is quashed.

Since we have allowed the issue raised in application filed under Rule 27 of the ITAT Rules, holding the re-opening as invalid, the appeal of the Revenue becomes infructuous and is dismissed.

In the result, application filed by the assessee u/s 27 is allowed and the appeal of the Revenue is dismissed.

Order pronounced on 27.05.2020 under Rule 34(4) of the ITAT Rules

Sd/-
(Ram Lal Negi)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 27.05.2020.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.