

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

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

**ITA No.5759/M/2016
Assessment Year: 2007-08**

Shri Prakash Chand Jain, Prop. of M/s. Prachi Gems, Shop No.10, Asmita Bridge Tower, Naya Nagar, Mira Road (E), Thane - 401107 PAN: AETPJ 5174K	Vs.	Income Tax Officer – Ward 2(4), Thane
(Appellant)		(Respondent)

**ITA No.6152/M/2016
Assessment Year: 2007-08**

Income Tax Officer – Ward 2(4), Room No.12, 6 th Floor, Ashar IT Park, B-Wing, MIDC, Wagle Indl. Estate, Thane (W)- 400 604	Vs.	Shri Prakash Chand Jain, Prop. of Prachi Gems, Shop No.10, Asmita, Bridge Tower, Nayanagar, Mira Road (E), Thane PAN: AETPJ 5174K
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Mani Jain, A.R.
Revenue by : Shri K. Madhusudan, D.R.

Date of Hearing : 02.03.2020
Date of Pronouncement : 20.04.2020

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled cross appeals have been preferred against the order dated 28.07.2016 of the Commissioner of Income Tax

(Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2007-08.

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2. The assessee has challenged the order of Ld. CIT(A) by raising two grounds challenging the confirmation of disallowance of Rs.3,37,20,214/- as against Rs.40,24,59,869/- made by the AO on account of alleged bogus purchases by ignoring the fact that the percentage of 6% applied is not inconsonance with the CBDT instruction No.2/2008 dated 22.02.2008. The assessee has also challenged the order of Ld. CIT(A) by raising additional grounds which are reproduced below:

“Without prejudice to the grounds of appeals appended to the appeal memo the appellant seeks to raise the following additional legal ground of appeal:-

1. On the fact and circumstance in the appellant's case and in law the learned assessing officer erred in re-opening the assessment u/s 147 by issue of notice dated 27.03.2014 u/s 148 which is merely due to change in the opinion and therefore the re-opening was bad in law.
2. On the fact and circumstance in the appellant's case and in law the learned assessing officer erred in re-opening the assessment u/s 147 by issue of notice u/s 148 dated 27.03.2014 which is barred by limitation in the first proviso to section 147 of the Income tax Act 1961.
3. On the fact and circumstance in the appellant's case and in law the learned assessing officer erred in not providing opportunity to cross examine to the appellant on the basis of whose statement the addition was made which is against the principle of natural justice and against the settled law.
4. On the fact and circumstance in the appellant's case and in law the Ld. AO in the reasons recorded has failed to record his satisfaction regarding failure of the part of the assessee to disclose the material facts.

The appellant prays your honour to admit the additional ground of appeal and adjudicate the same on merits as the issue involved is purely legal in nature.”

3. We would like to first deal with and adjudicate the jurisdictional issue raised by the assessee challenging that the

reopening under section 147 read with section 148 of the Act is bad in law in the additional ground no.1.

Admission of additional ground

4. The facts in brief are that the assessee is engaged in the business of trading in rough and polished diamonds and during the year filed the return of income on 16.10.2007 declaring total income at Rs.2,52,779/- which was processed under section 143(1) of the Act. The assessment under section 143(3) of the Act was framed in this case vide order dated 04.11.2009. Following a search action under section 132(1) of the Act on Shri Pravin Kumar Jain it was revealed that Shri Prakash Chand Jain, Proprietor of M/s. Prachi Gems is beneficiary of accommodation entries during the year to the tune of Rs.40,24,59,869/- the details whereof are given on page 2 of the assessment order. Accordingly, the case of the assessee was reopened under section 147 of the Act by issuing notice under section 148 on 27.03.2014. The reasons recorded by the AO under section 148(2) are reproduced below:

“In this case, information received from DIT (Inv.), Mumbai. A search action u/s 132 was carried out in the case of Shri Praveen Kumar Jain Group on 01.10.2013 on the basis of accommodation entries. M/s Prachi Gems is the beneficiary of the accommodation entries during F.Y. 2006-07 i.e. 2007-08. The details are as under:-

F.Y.	Name of concern controlled and managed by Praveen Kumar Jain	Name of the Beneficiary	Amount Involved (Rs.)
2006-07	JPK Trading (I) P Ltd.	Prachi Gems	96,90,816/-
2006-07	Faststone Trading Co. P. Ltd.	Prachi Gems	1,24,13,518/-

2006-07	Kailash International	Prachi Gems	58,14,400/-
2006-07	Kunal Gems	Prachi Gems	11,66,77,196/-
2006-07	Mahalaxmi Trading Co.	Prachi Gems	2,21,45,727/-
2006-07	Mohit International	Prachi Gems	6,57,29,104/-
2006-07	Natasha Enterprises	Prachi Gems	8,24,54,530/-
2006-07	Newplanet Trading Co, P Ltd.	Prachi Gems	8,72,84,578/-
2006-07	Ostwal Trading (I) P Ltd.	Prachi Gems	2,50,000/-
		Total	40,24,59,869/-

2. Thus, in view of the above, it is seen that the assessee has routed unaccounted money exceeding Rs.1.00 Lakh during the F.Y.2006-07, relevant to A.Y.2007-08 without paying any taxes thereon. As a result, the assessee has understated the income for A.Y.2007-08.

3. In view of the above, I have reason to believe that income of the assessee for A.Y.2007-08 to the tune of Rs.40,24,59,869/- has escaped assessment within the meaning of provisions of Section 147 of the I.T. Act, 1961. Therefore, the case of the assessee for A.Y.2007-08 requires to be reopened by issue of notice under section 148 of the I. T. Act, 1961. Since a time of four years, but not more than six years, has already elapsed from end of the relevant assessment year i.e. A.Y.2007-08, the undersigned is not empowered to issue notice under section 148 of the I. T. Act, 1961 unless sanction for issue of notice under section 148 is obtained from Addl. CIT in view of the provisions of section 151 of the I. T. Act, 1961 as no scrutiny assessment u/s 143(3) of the I. T. Act, 1961 has been found to be passed in this case for the relevant assessment year i.e. A.Y.2007-08.

4. Therefore, sanction for issue of notice under section 148 in this case for A.Y.2007-08 may kindly be accorded, if approved."

5. Finally, the assessment was framed under section 143(3) read with section 147 of the Act by making an addition of Rs.40,24,59,869/- vide order dated 27.03.2015 by holding that

purchases made by the assessee from various concerns related to Shri Pravin Kumar Jain are only accommodation entries.

6. The assessee challenged the reopening before the Ld. CIT(A), however, the same was dismissed after taking into consideration the submissions and replies of the assessee by observing and holding as under:

“9. With regard to the appellant's contention regarding change of opinion, it is seen that the concept of change of opinion is applicable only in those cases where an opinion has been formed in assessment u/s. 143(3) after considering various facts of an issue. In the appellant's case no order u/s. 143(3) of the I.T. Act was passed for the year under consideration and only processing was done u/s. 143(1). Therefore, there was no formation of opinion while processing the appellant's return of income and therefore the concept of change of opinion is not applicable in the appellant's case.

10. With regard to the second objection raised by the appellant i.e. application of 1st proviso to section 147, it is seen that the 1st proviso is applicable only in cases where the assessment u/s. 143(3) of the I.T. Act has been made and the case is reopened after four years from the end of the relevant assessment year. As already mentioned above in the appellant's case no assessment u/s. 143(3) of the I.T. Act was made and only processing u/s 143(1) of the I.T. Act was done, therefore, 1st proviso of section 147 is not applicable in the appellant's case. Therefore, for the detailed reasons discussed above and relying on various decisions as listed above, it is held that the assessment of the appellant has been reopened u/s. 147 of the I.T. Act as per law and therefore these grounds of appeal are dismissed.”

7. The Ld. A.R. vehemently submitted before us that the jurisdiction under section 147 of the Act was wrongly assumed by the AO as there is no fresh material before the AO and the issue stood examined thoroughly in the original assessment proceedings as framed under section 143(3) of the Act vide order dated 04.11.2009. The Ld. A.R. while referring to the reasons recorded under section 148(2) of the Act submitted that on the basis of information received from DIT (Inv), Mumbai to the effect that the assessee is beneficiary of accommodation entries during the year from various entities related to Shri Pravin

Kumar Jain and thus recorded in para 2 of the reasons recorded that assessee has routed unaccounted money exceeding Rs.1 lakh without paying any taxes and thus the assessee has understated the income during the year. The Ld. A.R. also pointed out by referring to para 3 of the reasons recorded that since a period of four years but not more than six years have lapsed from the end of the assessment year i.e. 31.03.2008 and therefore he has no power to issue notice under section 148 of the Act unless the sanction for issue of notice under section 148 of the Act is obtained from Additional CIT as provided and stipulated in the provisions of section 151 of the Act as no scrutiny assessment under section 143(3) of the Act was framed in the instant assessment year. The Ld. A.R. referring to the said para submitted that the assessee has recorded the reasons on the wrong and incorrect facts as in this case the assessment has been framed under section 143(3) of the Act vide order dated 04.11.2009, a copy of which is also submitted during the hearing before the Bench. The Ld. A.R. submitted that the basing the reasons on the said wrong facts and forming opinion on the basis of incorrect facts is fatal mistake which goes to the root of the assessment and therefore the re-assessment proceedings and also the consequent assessment framed under section 143(3) read with section 147 of the Act are void ab-initio and invalid. The Ld. A.R. submitted that in this case the sanction for issue of notice under section 148 of the Act was obtained from Additional CIT which was wrong and not proper. The Ld. A.R. argued that since in this case the assessment was framed under section 143(3) of the Act, the approval of Ld. CIT(A) should have been obtained. The Ld.

A.R., therefore, submitted that there was complete non application of the mind on the part of the AO while recording reasons under section 148(2) of the Act and therefore the reassessment proceedings may kindly be quashed. Without prejudice, the Ld. A.R. submitted that since the case was reopened after expiry of four years from the end of the relevant assessment year, the same could have been done after satisfaction of various conditions as envisaged in 1st proviso to section 147 of the Act. In terms of the said proviso the case of the assessee could only be re-opened in case of failure to disclose fully and truly material fact qua the income escaped during the assessment proceedings or to file the return of income by the assessee only then the reopening under section 147 can be resorted to and not otherwise but in the present case there is no such failure on the part of the assessee and therefore reopening is bad in law. The Ld. A.R. also submitted that there was complete non application of mind at the time of recording of reasons under section 148(2) and thus reopening proceedings are bad on that count also. In defence of his arguments that reopening is bad in law for the reasons that the approval has not been obtained from CIT in terms of provisions of section 151(1) of the Act. the Ld. A.R. cited the decisions namely CIT vs. SPL Siddardh Ltd. (2012) 345 ITR 223 (Del.) and Ghanshyam K. Khabrani vs. CIT (2012) 346 ITR 443 (Bom.- HC).The Ld. A.R. also relied on the decision of Hon'ble Gujarat High Court in the case of Shree Chalthan Vibhag Khand (2015) 60 taxmann.com 450 (Gujarat) wherein the Hon'ble Gujarat High Court has held that in absence of application of mind in the case of the assessee would not constitute valid reason to believe that income has

escaped. The Ld. A.R. finally prayed that the assessment proceedings and the consequent assessment may kindly be quashed as void ab-initio.

6. The Ld. D.R., on the other hand, relied on the order of authorities below by submitting that the sanction of JCIT was obtained under section 151(2) of the Act which would be suffice and in satisfaction of the condition laid down in section 151 of the Act. The Ld. D.R. submitted that on this issue only which is a procedural one, the arguments of the Ld. A.R. that reassessment proceedings and consequent assessment is void is against the provisions of the Act. The Ld. D.R. admitted that the notice under section 148 of the Act was issued after expiry of four years from the end of the assessment year and also considered that section 151(1) provides that obtaining of prior approval of PCIT or CIT for issuing notice under section 148 but obtaining approval under section 151(2) of JCIT would comply the said requirement and therefore the prayer of the Ld. A.R. deserved to be dismissed. On the issue of non application of mind by the AO while recording reasons, the Ld. D.R. submitted that the same were duly recorded and it is only the fact of having passed assessment under section 143(3) of the Act dated 04.11.2009 which was escaped from the attention of the AO which should not be given any weight and thus there was due application of mind by the AO and assessee can not be allowed to take the benefit of this technical flaw. The Ld. D.R. finally prayed that the order of the Ld. CIT(A) may kindly be sustained on this issue.

7. After hearing both the parties and perusing the material on record, we observe that in this case the AO has noted in para 3 that the notice is being issued after expiry of four years from the end of the relevant assessment year and therefore the sanction for issue of notice under section 148 is duly obtained from the Joint Commissioner of Income Tax which in our opinion is wrong as the provisions of section 151(1) of the Act mandates that no notice under section 148 of the Act shall be issued by the AO after expiry of four years from the end of relevant assessment year unless the Pr. CIT or Pr. Chief CIT is satisfied on the reasons recorded by the AO that it is a fit case for issue of such notice. In our considered view it is established principle of law that if a particular authority has been designated to record his or her satisfaction on any particular issue, then it is that authority alone who should apply his/her independent mind to record his/her satisfaction and further mandatory condition is that the satisfaction recorded should be independent and not borrowed or dictated satisfaction as has been held in the case of CIT vs. SPL Siddardh Ltd(Supra). Similarly, in the case of Ghanshyam K. Khabrani vs. CIT (supra) it has been held that when section 151(2) of the Act mandates satisfaction of Jt. Commissioner of Income Tax for issuance of notice under section 148 of the Act, the reopening of assessment with the approval of Commissioner of Income Tax is not sustainable. Moreover, we find that in this case, there is no application of mind by the AO as he has recorded the reason that no assessment under section 143(3) is framed in the instant case whereas as a matter of fact , an assessment was framed under section 143(3) of the Act dated 04.11.2009. Thus there was

complete non application of mind by the AO and we are not in a position to sustain the proceedings u/s 147 of the Act. Accordingly, we quash the reassessment proceedings as well as the order framed under section 143 read with section 147 of the Act.

8. Since we have decided the issue on jurisdiction of the AO, the other grounds raised by the assessee are not being adjudicated.

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9. Since we have quashed the reassessment proceedings by the AO under section 147 of the Act and also the consequent order framed under section 143(3) read with section 147 of the Act, consequently the appeal of the Revenue becomes infructuous and is dismissed.

10. In the result, the appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 20.04.2020.

Sd/-

(Ram Lal Negi)
JUDICIAL MEMBER

Mumbai, Dated: 20.04.2020.

* 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//

Sd/-

(Rajesh Kumar)
ACCOUNTANT MEMBER

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.