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

BEFORE SHRI S. RIFAUR RAHMAN, AM &
SHRI PAVAN KUMAR GADALE, JM

आयकरअपीलसं./ I.T.A. No. 3012/Mum/2017
(**निर्धारणवर्ष** / Assessment Year: 2007-08)

HBN Networks Pvt. Ltd. (Formally known as Telebrands India Pvt. Ltd) Plot No. A-168, Road No. 25, MIDC Wagle Industrial Estate, Thane-400 604	**बनाम**/ Vs.	The Dy. Commissioner of Income Tax, 15(3)(2), Mumbai, Pin-
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAAC2824J		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Dr. K. Shivaram, AR
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri R. Bhoopathi, DR

सुनवाईकीतारीख/ **Date of Hearing**	:	28.10.2020
घोषणाकीतारीख / **Date of Pronouncement**	:	08.12.2020

आदेश / O R D E R

PER S. RIFAUR RAHMAN (ACCOUNTANT MEMBER):

The present appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-24, in short 'Ld. CIT(A)', Mumbai, dated 14.02.17 for AY 2007-08.

2. The brief facts of the case are that assessee is engaged in the business of wholesale & retail marketing of consumer goods. The return was filed on 26.10.2007 declaring total income of Rs. 1,06,84,159/-. Later on, the case was selected for scrutiny and notice u/s 143(2) was issued on 17.09.2008 which was duly served on the assessee. Thereafter, assessment order u/s 143(3) was passed by the AO determining the total income at Rs. 1,09,00,990/-.

3. On information from Investigation Wing, it was alleged that assessee is indulged in bogus purchases. Accordingly, assessment was reopened by issuing notice u/s 148 of the Act on 24.03.2014 on account of escapement of income. In response, assessee filed an objection against re-assessment proceedings vide letter dated 07.05.2014. Further, notice u/s 142(1) was issued on 21.08.2014. Consequent upon restructuring, the case was transferred to DCIT and accordingly, fresh notices were issued and served upon the assessee and also intimated about the change of incumbent. In response, AR of the assessee filed the relevant information as called for.

4. After considering the submission of assessee, AO observed that assessee was unable to bring on record the relevant documentary evidence in the form of goods receipt, details of transportation of goods, etc. he observed that the circumstantial evidence itself proves the bogus nature of the transaction, the assessee took only bills from the parties as accommodation to explain the purchases, therefore the entire purchase cannot be added as bogus and needs to be taxed is the profit element embedded in such transaction. Accordingly, AO made assessment order u/s 143(3) r..w.s 147 of the Act by making addition on account of alleged bogus purchases.

5. Aggrieved by the above order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A), after considering the submission of assessee, dismissed the contention with regard to reopening of assessment with the following observations:-

> *"2.4.3 I have carefully considered the facts of the case and the submissions of the Ld.AR. I have also gone through the decisions relied on by the AC and the Ld.AR. With regard to the validity of notice issued under section 148 and the reassessment done, I am of the opinion that the notice u/s 148 was issued validly based on the valid information received from the Investigation Wing of Income*

Tax Department and the reopening was done within four years from the end of the relevant A.Y. The reopening of assessment on the basis of bogus purchases is held valid by the Hon'ble Bombay High Court in the case of Hitesh R. Shah (2013) 35 taxmann.com 474 even though the original assessment was concluded u/s 143(3) and even beyond four years. Further, in the instant case there was no scrutiny at all and the return was only processed u/s 143(1) and the assessment was reopened u/s 147 within four years. The AO has also followed due procedure of recording of reasons and supplying such reaons to the appellant on request. In view of the above the reassessment made is held invalid.

2.4.4. In view of the above discussion the reopening of assessment is held valid since there was "tangible material" available with the AO at the time of reopening the assessment in the form of information received from the DIT investigation. Further, as the assessment is reopened based on the evidence collected and statements recorded during the course of Sales Tax Departments investigation of "bogus sellers", the AO has a "reason to believe" that income has escaped assessment and there is "no change of opinion". The reopening proceedings are, therefore, upheld and the ground is dismissed."

6. Ld. CIT(A) also dismissed the contention of assessee with regard to addition on account of alleged accommodation bills with the following observations:-

7 Based on the evidence in hand in the form of a report from DIT (Inv), Mumbai, the AO has asked the

assessee to produce the parties along with evidence in order to verify the genuineness of the purchase transactions. The assessee instead submitted the ledger accounts of the above parties and bank statement extracts evidencing the payment through bank cheque. In this case, the onus lies on the assessee to prove the genuineness of the purchases and the assessee had to prove that the suppliers were genuinely existing. The assessee has not made any efforts to discharge the onus and failed to produce any of the parties. In spite of the opportunities given by the Ld. AO, the assessee could not satisfactorily substantiate and establish the fact that there were genuine purchases from these parties. There was a report from DIT (lnv) stating that all the seller parties as per the list supplied by them are bogus including the parties appearing in the books of the appellant company and as stated above, the assessee has not made counter submission to show that those parties are really existing. The AO has no other alternative but to bring to tax the bogus purchases by adopting G.P. ratio method @ 15% of such purchases keeping in view the gain made by the appellant due to purchases of material in grey market without bills and adjusting the purchases with the invoices taken from the hawala traders under discussion. While doing so the AO has rightly relied on the decision of the

Hon'ble Gujarat High Court in the case of Simit P Seth, (supra). Under these circumstances the AO cannot be found fault on this count. AO could not prove substantively that the amounts given cheque form have come back to the appellant, the activities entries in the trading community is not unheard of. Further, the in carried out by the Sales Tax Department, another Government Agency, with regard to VAT violation cannot be lost sight of. Further, as some of the names of the so-called bogus sellers out of the list supplied by the Sales Tax Department are appearing in the books of the appellant company, the link of involvement of appellant company in getting bogus bills is established. Even though there are catena of cases decided by the jurisdictional ITAT which have decided the issue in favour of the assessee, they are not uniform in all the cases as they were decided as per the facts and circumstances of that particular case before them. I am of the opinion that the facts and circumstances of the present case are more akin to the case decided by the Hon'ble Gujrat High Court in the case of Simit P Seth (supra.). Therefore, I hereby confirm the disallowance of 15% of the so-called bogus purchases made by the Ld. AO. The appellant has without prejudice contended that purchases from the alleged accommodation bill provider was wrongly taken by the AO at Rs.

97.47.147/- as against the actual amount of Rs. 92 94 953/- The AO is therefore directed to take the correct figure for computing the 15% of disallowance. The issue of estimation of 15% of the so called bogus purchases is in principle confirmed and subject to the above observation the grounds of appeal are ***dismissed.***

7. Now before us, the assessee is in appeal challenging the order of Ld. CIT(A) on the grounds mentioned below:-

I. Reassessment after the expiry of four years is bad in law.

1. The Learned CIT(A) failed to appreciate that, there was no failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment, Assessing Officer has passed the original order after considering all the relevant materials, hence the reassessment is bad in law on facts and circumstances hence liable to be quashed.

2. Without prejudice to above the learned CIT(A) erred in not following the ratio of Jurisdictional High Court and erred in relying on case laws which are not applicable to the facts of the appellant hence , order of CIT(A) affirming the order of reassessment order passed by the Assessing Officer may be quashed .

II. Addition of Rs.13,94,243/- @ 15% of alleged accommodations bills of Rs.92,94,953/-

3. Without prejudice to the above, the learned CIT (A) erred in confirming the addition of Rs.13,94,243/- without appreciating that all the purchases were genuine and supported by documentary evidence and quantitative details were furnished and books of account is not rejected hence addition confirmed by the CIT(A) may be deleted.

4. Without prejudice to above the Learned CIT(A) erred in confirming the order of the AO without providing a copy of the documents relied on by AO and opportunity of cross examination was not provided hence the addition confirmed by the CIT(A) may be deleted .

5. Without prejudice to above the appellant has shown GP percentage ranging from 59 to 77% hence further addition of 15% GP is without any basis and may be directed to be deleted .

6. The Appellant craves leave to add, amend, delete, alter, substitute, any or all the above grounds of appeal.

8. Ld AR brought to notice page 50 of the paper book which is notice issued under section 142 (1 of the act dated 16.02.2009,

issued by the AO at the time of a original assessment, he submitted that as per the notice, assessee was asked specifically details of purchases partywise and the details were already submitted. Further he brought to notice details which were submitted before AO which is placed on record at page 53 and page 54 of the paper book. Further he brought to notice page 55 of the paper book which is assessment order passed under section 143(3) of the Act. He brought to notice para 4 of the order in which assessing officer has described the nature of business of the assessee that is it is engaged in the business of wholesale and retail marketing of consumer goods.

9. Then he brought to notice page 58 of the paper book, it is a notice issued under section 148 of the Act issued on 24.03.2014. With reference to date of issue of the notice under section 148, he submitted that the issue of notice is clearly beyond 4 years. Further he brought to notice page 59 and 60 of the paper book, in which assessee has sought reasons for reopening the assessment and he brought to notice that assessee has filed the return of income under protest. In response, assessing officer supplied the reasons for reopening the assessment which is placed at page 61

and 62 of the paper book. Ld. A.R submitted that as per the reasons, the assessing officer reopened the assessment based on the information received from DGIT (INV) Mumbai. The main reasons to reopen the assessment was that it is alleged that the assessee has purchased accommodation bills from a concern Cape Town Mercantile Private Limited and relying on statement of Shri Praveen Kumar Jain. Further it was stated that assessee has not made full and true disclosure of income and its particulars in the return. He brought to our notice page 64 of the paper book in which assessee has raised various objections for reopening of the assessment. From the above letter submitted before assessing officer, he brought to notice difference in the name of the party that the name of the party is Cape Town Mercantile Company Private Limited whereas the assessing officer relied on the statement of Shri Praveen Kumar Jain and initiated the proceedings with the party name Cape Town Mercantile Private Limited. And also brought to our notice difference in the value of transactions with the party. With reference to point No. 3 of the above said letter, he submitted that in the case of Cape Town Mercantile company private limited

case, the honourable ITAT Mumbai held that the activities of the above said company is held to be genuine. He brought to notice the respective case which is placed on record.

10. Further he brought to notice page 80 of the paper book, it is a order passed by the AO in response to the objections raised by the assessee in its letter dated 7 May 2014. As per the clarification letter issued by the AO, it is stated that the assessment was reopened on the basis of information received from Sales Tax Department, he submitted that at the time of issue of notice under section 148, it was stated that the assessment was reopened based on the information received from DGIT investigation and based on the statement of Shri Praveen Kumar Jain. He submitted that in the clarification order it is stated that it is based on the information received from Sales Tax Department. He submitted that it is contradictory to each other. He brought to our notice para 6 of the assessment order, the AO rejected the contention of the assessee and proceeded to treat the purchases from the above dealer as bogus and proceeded to add 15% of the above purchases as gross profit and treated the above amount as additional undisclosed income earned by the assessee. He

brought to notice page 154 of the paper book, it is a statement submitted by the assessee to highlight the actual gross profit earned by the assessee which is at 62% and it is also highlighted that in various types of items handled by the assessee, the GP achieved by the assessee are in the range of 59% to 77% of the sales.

11. Further he brought to our notice para 2.4.3, in which Ld. CIT(A) adjudicated the issue of reopening of the assessment with the wrong notion that the reopening was done within 4 years from the end of the relevant assessment year whereas it is re-opened beyond 4 years. On the merit of the case, he submitted that assessee deals in wholesale business as well as retail and it supplies directly to the customers through e-portal. On merits, relied on the following case laws of the jurisdictional High Court of Mumbai in the cases of PCIT v. Shapoorji Pallonji and Co. Ltd. (2020) 423 ITR 220 (Bom) (HC) and PCIT v. Vaman International Pvt. Ltd (2020) 422 ITR 520 (Bom) (HC).

12. On the other hand, learned DR submitted that the reopening of the assessment was made based on the information from external agencies therefore the reopening of the assessment

is proper and with regard to merits of the case he relied in the orders of CIT(A) and AO.

13. Considered the rival submissions and material placed on record. We notice from the records placed before us that the original assessment under section 143(3) of the Act was passed on 30.10.2009 by making certain additions. The reopening of the assessment was initiated by issue of notice under section 148 of the Act on 08.04. 2014. It is a fact on record that the reopening of the assessment was made beyond 4 years of the present assessment year 2007 – 08 even though the reassessment was initiated based on the information i.e., sales tax Department. At the same time, we notice from record that the reassessment was initiated by issue of notice under section 148 on the basis that the information received from DGIT investigation and in turn based on statement of Shri Praveen Kumar Jain. When the assessee was sought for the reason of reopening of the assessment and based on the reasons supplied to them, assessee raised various objections for initiation of reassessment. Only in the order passed against the objections raised by the assessee, it was disclosed that the reassessment was initiated based on information from Sales

Tax Department. Even though the reassessment was initiated based on the 3rd party information/agency, it is the duty of the assessing officer to verify the information supplied by the outside agency and also it is duty on the assessing officer to bring on record the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment under consideration i.e., AY 2007 – 08 in relation to the information received from external agencies, considering the fact that the assessment was reopened beyond 4 years. We notice from the record that the assessee has filed its return of income and the same was taken up for scrutiny and assessment under section 143 (3) was completed and nowhere in the notice issued under section 148 of the Act discloses the fact of any failure on the part of the assessee, Even in the reassessment order AO has not brought on record any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment.

14. As held in the case of PCIT versus Light Carts (P) Ltd (2017) 85 Taxmann.com 331 (All) that where assessee disclosed all the material facts necessary for assessment, AO could not

reopen assessment after expiry of 4 years from the end of relevant year merely on the basis of information supplied by investigation wing that certain income earned by assessee had escaped assessment.

15. Similarly, the hon'ble Bomday High court held in the case of Hindustan Lever Ltd Vs R.B. Wadkar (**[2004] 137 TAXMAN 479 (BOM.)** as under:

> *"Where an assessment under section 143(3) has been made for relevant assessment year, no action can be taken under section 147 after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reasons of failure on the part of the assessee to disclose all material facts necessary for his assessment for that assessment year.* [Para 18]
>
> *In the instant case, the last date of the relevant assessment year was 31-3-1997 and from that date, if four years were counted, the period of four years expired on 1-3-2001. The notice issued was dated 5-11-2002, and received by the assessee on 7-11-2002. Under those circumstances, the notice was clearly beyond the period of four years.* [Para 19]
>
> *The reasons recorded by the Assessing Officer nowhere stated there was failure on the part of the assessee to disclose fully and truly all*

material facts necessary for the assessment of that assessment year. The reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestations of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish

vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise the reasons which were lacking in material particulars would get supplemented, by the time the matter reaches the Court, on the strength of affidavit or oral submission advanced.

Having recorded the finding that the impugned notice itself was beyond the period of four years from the end of the relevant assessment year and did not comply with the requirements of proviso to section 147, the Assessing Officer had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under section 143(3). On that short count alone, the impugned notice was liable to be quashed and set aside.

16. Respectfully following the above decisions, we are inclined to quash the reassessment order based on the fact that it is reopened beyond 4 years without bringing on record any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment.

17. We notice from the order passed by Ld. CIT(A) that the assessment was reopened within 4 years and he proceeded to

adjudicate the issue on reopening of the assessment in the above said wrong notion and sustained the addition made by the assessing officer. It is brought on record clearly that the reassessment was initiated beyond 4 years, therefore we restrict ourselves to adjudicate on jurisdiction issue and not going into merits of the case. Therefore, we accept the contentions of the assessee and accordingly the ground raised by the assessee in ground No. 1, 2 is allowed. The other grounds are not adjudicated. Accordingly appeal filed by the assessee is partly allowed.

18. In short, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 08/12/ 2020.

Sd/-	*Sd/-*
(Pavan Kumar Gadale)	(S. Rifaur Rahman)
न्यायिकसदस्य / Judicial Member	लेखासदस्य / Accountant Member

मुंबई Mumbai;दिनांकDated : 08.12.2020
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai

6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**