

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

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, JUDICIAL MEMBER**

**ITA No.3201/M/2018
Assessment Year: 2008-09**

Ms. Hema C. Shah, 5, Urmi Building, 5 th Floor, 65, A.G. Road, Worli Sea Face, Mumbai – 400 018 PAN: AAJPS 8892D	Vs.	ACIT-CC-5(4), Air India Building, Nariman Point, Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Mani Jain, A.R.
Revenue by : Shri Gurubinder Singh, D.R.

Date of Hearing : 17.06.2021
Date of Pronouncement : 20.07.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 12.02.2018 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09.

2. The grounds raised by the assessee are as under:

- “1. On the facts and circumstances of the Appellant's case and in law the Ld. Commissioner of Income Tax (Appeals) erred in confirming that the appellant has entered into accommodation transactions with M/s. Diamond Link.
2. On the facts and circumstances of the Appellant's case and in law the Ld. Commissioner of Income Tax (Appeals) erred in confirming the addition made by the Ld. AO amounting to Rs. 7,02,12,9017- on account of unsecured loan taken from M/s Diamond Link by treating the same as bogus transaction.
3. On the facts and circumstances of the Appellant's case and in law the Ld. Commissioner of Income Tax (Appeals) erred in confirming the addition made by the Ld. AO amounting to Rs. 85,2107- on account of difference in closing balance of bank statements.

4. The Appellant craves leaves to add, to amend, alter, modify and 7 or withdraw any or all of the above grounds of appeal, each of which are without prejudice to one another.

The appellant prays this Hon'ble Tribunal to delete the addition/disallowances made by the Ld. Assessing Officer, which is confirmed by the Ld. Commissioner of Income Tax (Appeals)."

3. The assessee has also raised additional grounds vide letter dated 30.08.2009 which are reproduced below:

"1. On the facts and circumstances of the Appellant's case and in law the Ld A.O. erred in re-opening the assessment u/s 147 by issue of notice dated 31.03.2015 u/s 148, which is merely due to change in opinion and therefore reopening is bad in law.

2. On the facts and circumstances of the Appellant's case and in law the Ld A.O. erred in re-opening the assessment u/s 147 by issue of notice u/s 148 dated 31.03.2015, which is barred by limitation of law in view of the first proviso to the Sec 147 of the Income Tax Act, 1961.

3. On the facts and circumstances of the Appellant's case and in law the Ld A.O. erred in passing the order u/s 143(3) r.w.s 147 without disposing off the objections filed by the appellant during the course of assessment proceedings.

4. The Appellant craves leaves to add, to amend, alter, modify and / or withdraw any or all of the above grounds of appeal, each of which are without prejudice to one another."

4. We would like to adjudicate the additional grounds first. The issue raised in 1st ground of appeal is against the order of Ld. CIT(A) affirming the reopening of assessment under section 147 of the Act by the AO by issuing notice under section 148 dated 31.03.2015.

5. The facts in brief are that the assessee filed the return or income on 31.03.2009 declaring an income of Rs.7,09,949/- which was processed under section 143(1) of the Act. A search and seizure action was carried out by the DDIT(Inv), Mumbai on 05.05.2014 on the assessee and its group company M/s. Decent Dia Jewels Pvt. Ltd. which was earlier a partnership concern known as M/s. Decent Diamond and also another group concern M/s. Brillare Reality Pvt. Ltd. During the course of

search, the search team found that the assessee group company M/s. Decent Dia Jewels Pvt. Ltd. was beneficiary of hawala/accommodation entries/unsecured loans which came to light during the course of search by DGIT (Inv.) Mumbai on Shri Rajendra Jain, Mumbai, Shri Sanjay Chaudhari and M/s. Dharni Chand group on 03.10.2013. The AO observed on the basis of information and on perusal of records of assessee that assessee has received an unsecured loan from hawala party M/s. Diamond Link of Rs.7,02,12,901/- and accordingly the case of the assessee was reopened under section 147 of the Act after recording reasons for reopening under section 148(2) of the Act and after obtaining necessary approval under section 151(2) of the Act and notice under section 148 of the Act dated 31.03.2015 was issued and served upon the assessee. The assessee complied the notice issued under section 148 vide letter dated 16.02.2016 requesting the AO to treat the return filed originally on 31.03.2009 as return filed in compliance to notice issued under section 148 of the Act. Thereafter, the statutory notices were issued and served upon the assessee. During the course of assessment proceedings the AO called for various details and explanation from the assessee to prove the identity, creditworthiness and genuineness of the transactions and assessee filed the necessary evidences during the course of assessment proceedings such as name, address, PAN number, balance sheet, confirmation and bank statements etc. to prove identity, creditworthiness of the lender and genuineness of the transactions. However, during the course of assessment proceedings it was also submitted that assessee has not raised this loan from any hawala party but from a concern owned by

assessee's brother in law and therefore it is not a case of bogus/hawala entries. However, the AO framed the assessment vide order dated 28.03.2016 passed under section 147 read with section 143(3) of the Act by making an addition of Rs.7,62,12,901/- on account of unsecured loan comprising Rs.7,02,12,901/- from M/s. Diamond Link and Rs.60,00,000/- from M/s. Super Jewels.

6. The assessee challenged the orders of the AO before the Id. Ld. CIT(A). However, the appeal of the assessee was partly allowed by confirming the addition of Rs.7,02,12,901/- being loan from Saliesh Shah, proprietor of M/s. Diamond Link whereas the other addition of Rs.60,00,000/- was deleted by Ld. CIT(A). The assessee dismissed the appeal of the assessee on legal issue of non disposal of objections filed by the assessee to reopening the proceedings. Now the assessee has taken the legal issue of reopening under section 147 of the Act being bad in law for the first time before the Tribunal. The Ld. A.R. submitted that this is being a legal issue and can be raised before any appellate forum at any point of time as no further verification of facts is required as all the facts are emanating from assessment records.

7. The Ld. D.R., on the other hand, opposed the legal issue raised by the assessee on the ground that this issue is being raised for the first time before the Tribunal and may kindly be dismissed.

8. After hearing the rival parties and perusing the material on record, we observe that the issue of reopening of assessment

and all connected facts were available on record and no further verification of facts is required to be done. Therefore, assessee is within her right to file the same before us and accordingly we are inclined to admit the same for adjudication.

9. The Ld. A.R. submitted before us that there is no application of mind while recording the reason under section 148(2) of the Act. The Ld. A.R. while taking us through the assessment order pointed out that the case of the assessee was reopened on the ground that assessee has received unsecured loan of Rs.7,02,12,901/- from hawala parties namely M/s. Diamond Link. The Ld. A.R. submitted that only on this basis the case of the assessee was reopened. The Ld. A.R. submitted before us that this is not a case of hawala party but in fact the assessee has raised the loan from a proprietary concern of her brother in law Shri Sailesh Shah and therefore the very foundation of the reason recorded is wrong and fallacious which goes to the root of the assessment and therefore the reopening on the basis of such incorrect reasons is wrong, invalid and void ab-initio. The Ld. A.R. submitted that the case of the assessee is squarely covered by the decision of the co-ordinate Bench of the Tribunal in assessee's own case in A.Y. 2007-08 in ITA No.3750/M/2017 wherein the co-ordinate Bench of the Tribunal has held that since there is no application of mind by the AO at the time of recording the reasons, the reopening is bad in law. The Ld. A.R. also referred to the other two decisions of the co-ordinate Bench of the Tribunal in the case of Bhatiya Diamond Pvt. Ltd. vs. ITO in ITA No.2822/Del/2018 and DCIT vs. Super Tech India Pvt. Ltd. ITA No.7012/Del/2014 the Ld. A.R. The Ld. A.R. finally submitted that in view of non application of mind in

recording incorrect reasons, the reopening is bad in law and may be quashed.

10. The Ld. D.R., on the other hand, relied heavily on the order of authorities below by submitting that the reopening is only a starting point where the AO has to form an opinion that income has escaped assessment and all the other verification of facts is done during the course of assessment proceedings. Therefore, the Ld. D.R. submitted that the issue raised by the assessee, which too for the first time before the Tribunal, may kindly be dismissed.

11. We have heard the rival submissions of both the parties and perused the material on record. We observe that in this case the reasons have been recorded by the AO that assessee has raised unsecured loan of Rs.7,02,12,901/- from hawala parties namely M/s. Diamond Link and accordingly the assessment was reopened under section 147 of the Act by issuing notice under section 148 of the Act dated 31.03.2015.

12. The undisputed facts are that the assessee has raised this loan from Shri Sailesh Shah's proprietary concern of M/s. Diamond Link, who is brother in law of the assessee. The reasons recorded are reproduced as under for the sake of ready reference:

"5. On the basis of the information, and perusal of records of the assessee for the year under consideration, it was revealed that the assessee had received unsecured loan from the following Hawala Party as under:

Name of Hawala Parties	F.Y.	Bill Amount (Rs.)
[M/s Diamond Link _	2007-OB	7,02,12,901

In view of the above, the case of assessee was re-opened for the it A.Y. 2008-09, under the provision of section 147 of the I.T. Act, duly recording the reasons for re-opening and obtaining Statutory under the provision of section 151(2) of the I.T. Act, 1961. A u/s. 148 dated 31/03/2015 was issued to the assessee, which was duly served upon her on the same day i.e 31/03/2015.”

13. After perusing the reasons recorded , we find that there is a complete lack of application of mind by the AO while recording the reasons as the AO has wrongly recorded the reason that the loan is raised from the hawala party M/s. Diamond Link whereas M/s. Diamond Link is not a hawala party but a proprietary concern of Shri Sailesh Shah who happens to be brother in law of the assessee. Under these facts and circumstances, the reopening of the assessment as done by the AO is wrong and void ab-initio. The case of the assessee is squarely covered by the decision of the co-ordinate Bench of the Tribunal in ITA No.3750/M/2017 for A.Y. 2007-08. The operative part whereof is reproduced as under:

“We also notice that the reasons recorded by the AO for reopening of assessment are vague, i.e., the reasons show that the assessing officer was not clear in his mind about the escapement of income, when he reopened the assessment. Following observations made by the AO in the reasons for reopening makes this point clear: -

(a) The AO has mentioned about "accommodation bills" alleged to have been availed by the assessee.

(b) The AO states in paragraph 3 that "the records of the assessee for the year under consideration reveal that the assessee has adopted this modus operandi during the year under consideration". In fact, the records of the assessee did not indicate any modus operandi, instead, the search and seizure operation in the cases of Rajendra Jain and other groups only revealed about the accommodation entries.

(c) In the reasons, the name of the company was mentioned as "Sparsh", where as the name of the company from which the assessee had availed unsecured loan was "Sparsh Export P Ltd". This fact shows that the assessing officer was also not clear about the name of the concern from which the assessee had availed accommodation entries.

(d) In paragraph 5, the AO states that the income chargeable to tax, as indicated above, to the tune of Rs.45,00,000/- or any other income

chargeable to tax which comes to my notice subsequently in the course of assessment proceedings for re-assessment has escaped assessment for A.Y 2007-08." By the expression "as indicated above", the AO is referring to accommodation bills. Further, he also states that "any other income....", meaning thereby, he was not sure as to the nature of income that has escaped assessment.

(e) The AO further states that he is satisfied that the assessee has failed to disclose true and complete particulars of its income for the year under consideration. In the instant case, the assessing officer has reopened the assessment after expiry of four years from the end of the assessment year. Hence the AO has observed so in order to comply with the requirement of the first proviso to sec. 147 of the Act. When the AO is not clear about the nature of income that has escaped the assessment, then how the AO could charge the assessee that there was failure on the part of the assessee to disclose fully and truly all material facts.

16. All these points would show that the AO was not clear in his mind as to the income, which has escaped the assessment. When there is no application of mind by the AO, the reopening is liable to be cancelled. It was so held by the Jaipur bench of ITAT in the case of M./s Damodar Oil Mills Company P Ltd vs. ITO (ITA No.515/JP/2016 dated 11-05-2018). In this case also, the AO reopened the assessment on the reasoning that the said assessee has availed accommodation entries by way of bogus purchase bills. It was noticed that the assessee had actually received share application money. Accordingly it was held that the reopening of assessment is bad in law. For the sake of convenience, we extract below the operative portion of the order passed by the Jaipur bench of Tribunal: -

"7. We have heard both the sides on this issue. We have considered the case laws relied upon by both the sides. We have also gone through the reasons recorded by the Assessing Officer for issuing the notice U/s 148 of the Act on 25/3/2014. It is noticed that the Assessing Officer received information from DGIT(Inv), Mumbai. The details of the entry provider company and nature of entry and amount was provided.

However, while recording the reasons, the Assessing Officer has written that the assessee has obtained entries of bogus purchases. Further in finally recorded the satisfaction to issue the notice U/s 148 of the Act, the Assessing Officer has recorded the reasons, which are reproduced hereunder:

"The accommodation entries of bogus sales provided by the above companies constitute bogus purchases in the hands of the assessee. The assessee has suppressed its profits by taking accommodation entries of bogus purchases. Therefore, I have reasons to believe that minimum income of Rs,65,00,000/- has remained escaped to be taxed in terms of section 147 r.w.s. 148 of the I.T. Act for the assessment year under consideration."

Thus the Assessing Officer has categorically recorded in the reasons that the assessee has suppressed its profits by taking accommodation entries of bogus purchases. The intimation from DGIT (Ihv), Mumbai was about the bogus investment /share applications. Thus, the Assessing Officer has not at all applied his mind while recording the reasons. The facts on record clearly establishes that the Assessing Officer has not applied his mind so as to come to a conclusion that he has reason to believe that the income has escaped assessment for the year under consideration. The reasons recorded are vague and are not based on any tangible material as well as on the facts acceptable in the eyes of law. The reasons recorded also suggest that the Assessing Officer has mechanically issued notice U/s 148 of the Act even not bothering regarding the nature of information received from the DGIT (Inv), New Delhi. Such vagueness in the reasons recorded make reopening bad in law and deserved to be quashed. Such view is also supported by the various decisions of the Hon'ble High Courts and the Tribunals as stated (supra). Therefore, we quash the reopening of the assessment."

17. In the instant case also, there is no tangible material to show that the assessee has availed accommodation bills. Further, the AO is not clear in his mind as to what income has actually escaped income. The AO is referring to the record of the assessee and has observed that the assessee has adopted the modus operandi, where as the above said modus operandi came to light to the department only during the course of search operations conducted in the case of Rajendra Jain and other groups. Though the AO is stating that there was failure on the part of the assessee to fully and truly disclose all material facts, yet there is no material to support the same. All these facts would show that the AO has reopened the assessment in a mechanical manner, without application of mind. It will make the reopening bad in law as held by Hon'ble Delhi High Court in the case of CIT vs. Kamdhenu Steel & Alloys Ltd & Ors (2012)(68 DTR 38)(Del). Hence reopening of assessment, in the instant case, is liable to be quashed on this ground."

14. Considering the facts of the case in the light of the decision of the co-ordinate Bench of the Tribunal, we are inclined to hold that reopening proceedings are bad in law and so is the assessment framed by the AO under section 143(3) read with section 147 of the Act. The additional ground No.1 is allowed.

15. Since we have allowed the appeal of the assessee on jurisdictional issue, the other grounds raised by the assessee on legal issues as well as on merit are not being adjudicated.

16. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 20.07.2021.

**Sd/-
(Ravish Sood)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 20.07.2021.

* 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.